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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Petitioner*

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

The court of appeals held in this case that the contracts between the National Collegiate Athletic Association (NCAA) and the television networks, and the television plan adopted by the NCAA's members, violate the antitrust laws under both per se and Rule of Reason approaches. The case accordingly presents questions about the characterization of conduct as illegal per se and the appropriate scope of the market.

1. Whether an agreement among universities to establish television packages for football may be held unlawful per se, despite the existence of procompetitive features, because it reduces the number of different games shown on television.

2. Whether in order to avoid application of the per se rule the defendant in an antitrust case must prove not only the existence and extent of procompetitive benefits but also the "necessity" of the contractual arrangements.

3. Whether college football television programming on Saturday afternoons is a separate market for antitrust purposes.

4. Whether a process of competitive bidding ending in the letting of contracts for the telecasting of college football must be treated as a suppression of competition because, once the contracts have been signed, there is no further rivalry game-by-game for broadcast rights.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-40a) is reported at 707 F. 2d 1147. The opinion of the district court (App. B, *infra*, 41a-134a) is reported at 546 F. Supp. 1276.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 137a) was entered on May 12, 1983. The court of appeals' order denying a petition for rehearing and suggestion of rehearing en banc (App. D, *infra*, 139a) was entered on June 23, 1983. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U. S. C. § 1 (1976), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

STATEMENT

1. The NCAA establishes rules for the conduct of intercollegiate sports among its members. It was founded near the turn of the century in response to public outcry about the increasing violence, injury, and professionalism in college football. Some 785 public and private colleges and universities, together with more than 100 athletic conferences and other organizations, are members today. They collectively deliberate and adopt the rules, for a wide variety of sports, at annual conventions.

The NCAA's football policies run the gamut from the rules of play and basic prohibitions of payment to student-athletes (which would violate the amateurism policy) to the most sophisticated controls on the recruiting and academic eligibility of student-athletes, the size of coaching staffs, the times of practice, the number of games that may be played, and the telecasting of regular season games. This case involves the telecasting rules.

A Television Plan, and the contracts between the NCAA and three television networks (ABC, CBS, and Turner), govern the telecasting of football games of the NCAA's members. Under the Plan and contracts, ABC and CBS each present 14 "exposures" of football every fall (an exposure is a time slot on the network, and the network may show a national game or multiple "regional" games in the slot), and the Turner cable "superstation" presents 19 evening games.

Although the Plan and contracts create telecasting opportunities, they also restrict the time and manner in which

universities may telecast their games. The limits take several forms. First, there are only a designated number of network telecasts. Second, there are limits on the number of times any university may appear on national (or regional) telecasts in a two-year period, and the networks have corresponding obligations to show a minimum number of different teams. Third, there are practical limits, given the existence of the contracts, on the ability of any university to hold out for higher payments for games that are telecast. Fourth, the Plan authorizes only limited "exception" telecasts that might compete with the networks or other live games. Major colleges generally may telecast their games outside the contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out. There are other exceptions for smaller football programs, including those that have not recently been on national television. Telecasts of post-season bowl games also are outside the scope of the TV Plan and contracts.

Plans with similar features have been in place since 1951. The plans for 1951-53 were submitted to the Antitrust Division of the Department of Justice for review. The Division raised no objections, and since that time the NCAA has refined but not altered the basics of the plans: network packages with limited appearances by each university on the network and limited "exception" telecasts. The number of annual network exposures has increased from 12 in 1952 to 47 or more under the contracts now in force. The number of network appearances per school has increased from one in 1952 to six over any two-year period today. The number of networks has increased from one in 1952 to three (ABC, CBS, and Turner) today. The number of different games shown has increased from 12 in 1952 to 228 in 1982: 106 on the networks and 122 under the exception rules.

2. Respondents sought injunctive relief from the limits on telecasting contained in the Television Plan and network contracts. They argued that the Plan and contracts violate the antitrust laws because, among other things, the networks'

practice of offering equal payments for every game telecast nationally or regionally was "price fixing"; the NCAA members' refusal to telecast games other than in accordance with the Plan and contracts and the NCAA's threat (never carried out) to penalize members that violated the rules were "boycotts"; the NCAA's large role in football telecasting was "monopolization"; and at all events the Plan and contracts were unreasonable.

3. After a bench trial the district court agreed with respondents on all issues (App. B, *infra*, 41a-134a). The Plan and contracts are price fixing, the court held, because the contracts specify an aggregate amount of compensation which the networks divide among appearing teams; thus teams receive similar prices even though some games may be more attractive than others. The prices are not what would prevail if games were sold one at a time, the court reasoned, and thus are "fixed" unlawfully (e.g., *id.* at 59a-61a, 64a, 87a). Similarly, the Plan and contracts are unlawful per se as boycotts because the NCAA's members agree not to deal with broadcasters other than through the Plan and contracts, and the NCAA's members agree not to televise games with other members that violate the Plan (*id.* at 100a-104a).

The district court also held the Plan and contracts unlawful as monopolization under section 2 of the Sherman Act because, in the court's view, the relevant market is college football telecast on Saturday afternoons in the fall, and the NCAA has always controlled this market and imposed unreasonable controls (App. B, *infra*, 105a-125a). For similar reasons, the court held the Plan and contracts a violation of section 1 under the Rule of Reason (*ibid.*).

The injunction entered by the district court declared the Plan and 1982-85 contracts void and barred the NCAA and its officers from making any "other contract of similar kind or nature in the future" (App. B, *infra*, 136a). It also prohibited the NCAA and its officers from interfering with members' sale of television rights or requiring any relinquishment of television rights as a condition of membership (*ibid.*).

4. The court of appeals affirmed, but on significantly different grounds (App. A, *infra*, 1a-27a). It rejected the boycott holding (*id.* at 22a-25a), it concluded that the influence of the contract on the allocation of payments among teams is not price fixing (*id.* at 7a & n. 5, 12a & n.11), and it declined to review the monopolization holding, concluding that it would not affect the relief (*id.* at 20a n. 16). It concluded, however, that the Plan and contracts violate the antitrust laws because they reduce the number of different games shown on television. Universities that would like to contract outside the network arrangements often cannot do so. The court of appeals concluded that this is a reduction of output, unlawful per se (*id.* at 8a-15a).[1]

The court of appeals acknowledged that the NCAA advanced procompetitive justifications for the Plan and contracts. The NCAA argued that the restrictions facilitate competition with other forms of entertainment on TV by maintaining balance among teams, and by making it possible for networks to promote a unified product. To the extent these goals are achieved, output increases. Moreover, the NCAA argued that the Plan increases live attendance at games, another measure of output. The Department of Justice filed an *amicus* brief arguing that, in light of these procompetitive justifications, the Plan and contracts could not be held unlawful per se. (The Department agreed with the district court, though, on the Rule of Reason analysis.)

The court of appeals rejected these justifications for two reasons. First, it placed on the NCAA "the burden of proving the effectiveness and necessity" of the Plan and the contracts in

[1] The NCAA argued that the plaintiffs, as members of the NCAA seeking a larger market share but endorsing most of the NCAA's controls, do not suffer antitrust injury. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 144-46 (1968) (White, J., concurring); *Schoenkopf* v. *Brown & Williamson Tobacco Co.*, 637 F. 2d 205, 211 (3d Cir. 1980). The court of appeals rejected this contention (App. A, *infra*, 3a-6a). Although we disagree with this holding, we do not present it as a separate question for review by this Court.

producing the procompetitive benefits asserted for it (App. A, *infra*, 11a & n. 9, 15a). Second, given this allocation of burdens, the court of appeals thought that the NCAA had fallen short; the procompetitive benefits were not so overwhelmingly plain that the reduction in the number of games shown could be excused. It called one effect "not unambiguously procompetitive" (*id.* at 10a), characterized the gains of another as "speculative" (*ibid.*), said that a third could be achieved by "less restrictive means" (*id.* at 11a), and disregarded a fourth altogether (*id.* at 12a-14a). It expressly rejected the position of the Antitrust Division (*id.* at 8a n. 6).

Although the holding of per se illegality ordinarily would have been dispositive, the court of appeals, believing review by this Court to be likely, went on to record its views on other questions (App. A, *infra*, 15a). The principal remaining subject was a Rule of Reason analysis. The court of appeals first concluded that the appropriate market is college football shown on Saturday afternoons in the fall (*id.* at 16a-19a), in which the NCAA possess a very large share. With market power thus established, the court of appeals concluded that the Plan and contracts are unreasonable restraints, largely because, once they are signed, there is no further competition between networks for the telecasting of individual games or between schools for rights fees, although the schools compete vigorously for network appearances.

Although it found a violation, the court of appeals concluded that the district court had erred in designing relief. The injunction swept too broadly (App. A, *infra*, 25a-27a), improperly banning the NCAA from taking any role in telecasting. The court thought that the NCAA could use football controls as sanctions for violating other rules, could prohibit telecasting on Friday nights (when high schools play), and could formulate other "less restrictive" plans, including pass-over payments and arrangements that did not entail assertion of exclusive rights to telecasting (*id.* at 21a, 26a-27a). It stated that although "the NCAA cannot lawfully maintain exclusive control of the [telecasting] rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of

the instant case" (*id.* at 27a). The court did not vacate the injunction, however, but rather affirmed and remanded to the district court to reconsider in light of the views expressed in the opinion (App. A, *infra*, 27a; App. C, *infra*, 137a).[2] This left the injunction in effect, and respondents say that the district court properly may order the NCAA "out of the television football business altogether" (Response to NCAA's Application for Stay, dated July 19, at 8) despite the Tenth Circuit's rationale.

Judge Barrett dissented (App. A, *infra*, 28a-40a). He agreed with the NCAA on every point in dispute and also concluded that because of the amateur and educational nature of college football, the application of the ordinary approach to antitrust analysis is unwarranted. In particular, Judge Barrett concluded that "the district court failed to adequately focus on the procompetitive features of the NCAA television plan-contracts" (*id.* at 33a), that the Plan and contracts "on balance, promote competition and enhance viewership" (*id.* at 38a), and that the NCAA is "a form of joint venture, and its television plan and contracts are an integral, all-important aspect of its purposes and goals" (*id.* at 39a).

The NCAA sought rehearing en banc. Three of the Tenth Circuit's eight active judges disqualified themselves. Judge Barrett voted in favor of rehearing en banc (App. D, *infra*, 139a).

On July 16, 1983, Justice White granted a temporary stay, which he extended on July 21, 1983, pending the filing and disposition on this petition (App. E, *infra*, 141a-44a).

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[2] The NCAA believes that this approach is unwarranted. Under controlling cases, including *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), and *Schmidt* v. *Lessard*, 414 U. S. 473 (1974), an appellate court is required to vacate a vague, overbroad, and unjustified decree, not just to affirm and give advice to the district court. Given the respondents' position that the district court should disregard the Tenth Circuit's opinion and adhere to its initial injunction (Response to NCAA's Application for a Stay, dated July 19, 1983, at 8), the court of appeals' error may have substantial effects. Nonetheless, we do not present the remedial issues for separate consideration here (but cf. note 12, *infra*).

REASONS FOR GRANTING THE PETITION

This case involves issues of moment to all amateur sports and to antitrust law in general. The decision of the Tenth Circuit would call for review even if it affected no more than the subject of the case, the NCAA's Television Plan and network contracts. The decision has nationwide effect because it binds the NCAA and all of its members. It affects the major TV networks, hundreds of TV stations, hundreds of universities, hundreds of millions of dollars of revenues, and billions of viewers.[3] The court of appeals indicated that it expected this Court to review its decision (App. A, *infra*, 15a).

In issuing the stay, Justice White said that the "judgment below obviously would have a major impact countrywide, and the case plainly presents important issues under the antitrust laws" (App. E, *infra*, 143a). On this basis, Justice White predicted that four Justices probably would vote to grant review (*ibid.*).

More than football is at stake. The principles applied by the court of appeals extend to many forms of cooperative behavior. One cannot easily confine the decision to large organizations such as the NCAA; per se rules apply to agreements affecting a city no less than agreements affecting the nation. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (agreement among beer wholesalers in Fresno, California, held unlawful per se). If the television plan and contracts are unlawful per se because horizontal rivals (the colleges and universities) cooperate in a way that reduces the number of different games shown, then an agreement among members of the Big Eight Conference to establish a "Big Eight Game of the

[3] The network contracts alone call for minimum payments of $74.288 million in 1983, more in 1984 and 1985 (App. B, *infra*, 58a-61a). The affected audience: some 22.5 million for each of the 28 annual exposures on ABC and CBS. The size of the 1982-85 contracts understates the stakes of the case; the present value of a stream of payments of $74.288 million, extended for 32 years (the length of time the NCAA has had a TV Plan) and discounted at 2% (see *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131, June 15, 1983) is $1,743,000,000.

Week" in basketball also is unlawful per se. (The Big Eight has such an arrangement, under which members sell the games as a package to a single network, split the television appearances and rights fees equally, and agree not to show games in competition with those selected for telecasting in the series.) An agreement among professional golfers to telecast selected tournaments and not others as part of a PGA series is unlawful per se. An agreement among a city's sports teams to form a telecasting service for their games could not easily be sustained.[4] Almost every successful professional sport has pooled and sold TV rights as a package to one or more networks, assuring the purchaser of a degree of exclusivity to enable it to promote the series. The list of endangered arrangements could go on and on.[5]

More than sports is at stake. Ventures that entail some cooperation between people who would otherwise be rivals are common features of economic life. The producer of several television series may insist that the actors in each series not organize their own shows, or use any series' characters, in a way that would compete with any of the producer's works. The cooperation helps the producer to create a product that is more successful against shows produced by others. Similarly, any large firm may coordinate the activities of thousands of people

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[4] The Chicago White Sox (baseball), Bulls (basketball), Sting (soccer), and Black Hawks (hockey) have formed SportsVision, a pay TV service that carries their games. Although SportsVision televises more games than had previously been carried on free TV, the number of free TV games is down, as the teams have agreed not to telecast games in competition with SportsVision. This could be characterized as an illegal reduction of output under the Tenth Circuit's approach. A similar arrangement in Minneapolis between the Minnesota Twins (baseball) and Minneapolis North Stars (hockey) has been challenged by a television station that bid unsuccessfully for a contract to carry the games. *Midwest Communications, Inc.* v. *Minnesota Twins, Inc.*, Civ. 3-82-1729, D. Minn. (sub judice).

[5] Professional football, baseball, basketball, and hockey have a statutory antitrust exemption for telecasting agreements, 15 U. S. C. § 1291 (1976), but this applies only if certain conditions are satisfied, and it does not pertain to other professional sports or any amateur sports. The exemption does not expressly cover sharing of revenues or cable arrangements, and some forms of pooling of rights are not covered.

who could compete. It is not inevitable that Chevrolet, Buick, and Pontiac are part of General Motors rather than competitors. In any economic organization there will be some span of activities over which competition is suppressed, so that the organization can compete against other economic organizations. The "suppression" of competition inside such organizations is beneficial to society precisely because only cooperation makes it possible for firms to compete.

The decision of the court of appeals calls into question these principles—until now well accepted in this Court's cases. It suggests that *any* activities that reduce competition in any particular—even if they increase competition against other economic units—may be held unlawful per se if the court is not impressed with the procompetitive justifications after a very superficial assessment. It holds that once the plaintiff demonstrates the existence of a "restraint," the defendant bears not only the burden of *proving* that procompetitive benefits were achieved but also of showing that the restraint was *necessary* to achieve these benefits, else the restraint will be held unlawful per se. Such an allocation of burdens poses substantial risks to the most mundane business organization.

It would be hard to prove, even for a firm as tightly integrated as IBM, that the combination of several different computer and office machine businesses under one roof is procompetitive. The benefits of organization, plain enough in gross, are hard to prove up in a courtroom. See R. Bork, *The Antitrust Paradox* 122-29, 133 (1978). It would be harder still to show that any given set of restraints is "necessary" to the achievement of the gains, when many different marketing approaches could be chosen. Other business organizations, such as sports leagues, hospitals, commercial buildings (offices and shopping centers), which could be, and sometimes are, organized without tight corporate ties, almost certainly would fail to meet the court of appeals' test. The decision thus throws into uncertainty many of these loosely-controlled ventures, which could be called "partially integrated."

The question at issue here ultimately is one of characterization, which arises over and over in recent cases.[6] How should a court deal with the restrictive aspects of ventures that are procompetitive in the main? The court of appeals here turned a microscope on one feature of an organization that, the court conceded, generally is beneficial. By divorcing the NCAA's television controls from its other forms of organization, by treating them as naked rather than ancillary restraints, the court of appeals saw only reductions in competition. Yet any cooperative agreement looks like "pure restraint" if the perspective is sufficiently myopic. The task for antitrust law is to find a way to *distinguish* restraints that promote competitive efficiency from those that restrain it. Severing such agreements from a broader competitive picture is not likely to accomplish that task.

A different way to conduct the characterization inquiry is to ask whether the arrangements in question could help one group or economic unit to compete successfully against others.[7] The

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[6] E.g., *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979); *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332 (1982). The problem stretches back to *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918), the classic statement of the Rule of Reason, in which the Court characterized as beneficial and procompetitive a horizontal agreement among traders not to conduct business at certain times and prices. Two cases set for review in the 1983 Term also involve characterization issues related to this case. *Monsanto Co.* v. *Spray Rite Service Co.*, No. 82-914, cert. granted, Feb. 28, 1983, to review 684 F. 2d 1226 (7th Cir. 1982) (decision applying the per se rule to manufacturer's termination of a distributor; characterization issue concerning the definition of price fixing); *Jefferson Parish Hospital District No. 2* v. *Hyde*, No. 82-1031, cert. granted, Mar. 7, 1983, to review 686 F. 2d 286 (5th Cir. 1982) (characterization issue concerning application of per se rule to cooperation of hospital and anesthesiology group in provision of medical services).

[7] The Solicitor General has adopted this approach to substance over form in antitrust, recommending it in *amicus* briefs filed in this Court in

(Footnote continued on following page)

Court has emphasized the importance of promoting interbrand competition. E.g., *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977). The appropriate question from such a perspective is whether the arrangements hold out a substantial potential to create by competition the economic efficiency that the antitrust laws were designed to promote. If a practice potentially aids competition against other units, then the activities cannot be unlawful per se, and only the strongest evidence should be allowed to support condemnation under the Rule of Reason.

We submit that the Television Plan and contracts aid the NCAA and its members in competing against other purveyors of entertainment. As a logical matter, one must start with an assessment of the market. Many practices are ambiguous; they may assist in competition if employed by one with a small market share, even though they offer no such benefits if employed by dominant aggregations. See page 19, *infra*. Thus characterization may depend on knowing who are the venture's rivals. We do not proceed in so logical a fashion here, largely because the court of appeals did not. We take up, in order, the per se question, the assignment of burdens, the definition of the market, and the treatment of the contracts as competition for the market. These questions are tightly related. Each of them, however, is important to antitrust policy in its own right. Each has produced a conflict among the circuits. Each calls for review by this Court.

1. The NCAA's Plan and TV contracts are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product

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(Footnote continued from preceeding page)

Monsanto, supra note 6; *Jefferson Parish, supra* note 6; and *Copperweld Corp.* v. *Independence Tube Corp.*, No. 82-1260, cert. granted, June 20, 1983, to review 691 F. 2d 310 (7th Cir. 1982). Thus the functional approach to antitrust we advocate—emphasizing competition among economic units rather than focusing exclusively on the existence of restraints—is before the Court now. This case profitably may be heard in conjunction with *Monsanto, Jefferson,* and *Copperweld.*

in a way attractive to both fans in the stadiums and viewers on TV. The court of appeals conceded that the NCAA is a lawful joint venture, that most of the rules governing play, recruiting, amateurism, and so on, are lawful, and that there are plausible procompetitive justifications for the Television Plan itself.

This should be enough to preclude application of the per se rule. The Department of Justice, appearing as *amicus curiae*, agreed with this submission. It follows from many of this Court's characterization cases holding that the per se rule is confined to naked restraints and does not apply to mergers, joint ventures, and other forms of cooperative activity, despite the fact that any joint activity has a potential for anticompetitive consequences. The Court has held repeatedly that the potential benefits of cooperation require application of Rule of Reason, not per se, analysis. E.g., *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1 (1979); *Chicago Board of Trade* v. *United States*, 246 U. S. 231 (1918). See also *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 355 (1982) (agreement among otherwise-competing physicians to offer complete medical coverage for a fixed fee would be "perfectly proper").

The lower courts consistently apply the Rule of Reason to joint ventures, even those with limits on competition much more sweeping than the TV Plan and contracts. E.g., *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F. 2d 1030, 1050-55 (9th Cir. 1983), cert. pending, No. 83-88 (to condemn a joint venture just because it has market splitting devices would be the sort of literalism condemned in *Broadcast Music*). Similarly, a large number of cases apply the Rule of Reason to amateur and professional sports, recognizing that organized sports have beneficial, output-enhancing features, and that it is therefore inappropriate to isolate particular aspects of a sports league for per se condemnation.[8]

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[8] E.g., *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F. 2d 813, 821-24 (9th Cir.), cert. denied, 456 U. S. 1011 (1982) (temporal market allocation by horizontal competitors not unlawful per se); *North American Soccer League*

(Footnote continued on following page)

Of course, Rule of Reason analysis would be inappropriate if the Plan and contracts truly were "naked restraints," but the court of appeals did not so characterize them. There are procompetitive benefits. We cannot describe all of them here, but one so stands out that it alone precludes per se analysis.[9] The Plan and contracts spread national and regional TV appearances among more teams than would be the case in their absence. This puts the teams on more equal footing in recruiting new players and financing their programs. That is to say, it promotes "balance."

For products that can be used by themselves, "balance" is an odd justification; who would say that promoting "balance" between Boeing and Lockheed in the sale of aircraft is an

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v. *NFL*, 670 F. 2d 1249 (2d Cir.), cert. denied, 103 S. Ct. 499 (1982) (agreement among NFL owners not to participate in other sports ventures must be judged by Rule of Reason); *U.S. Trotting Ass'n* v. *Chicago Downs Ass'n*, 665 F. 2d 781 (7th Cir. 1981) (en banc) (cooperation among rivals in indentifying horses' records, and agreement not to race horses under some circumstances, must be judged by Rule of Reason and is lawful); *Smith* v. *Pro-Football, Inc.*, 593 F. 2d 1173 (D. C. Cir. 1979) (collecting earlier cases) (agreements among sports teams on drafting and compensating players must be judged by Rule of Reason); *Hennessey* v. *NCAA*, 564 F. 2d 1136, 1151-54 (5th Cir. 1975) (agreements among NCAA universities must be judged by Rule of Reason); *Howard University* v. *NCAA*, 510 F. 2d 213, 220 (D. C. Cir. 1975) (same); *Warner-Amex Cable Communications, Inc.* v. *ABC*, 499 F. Supp. 537, 544-46 (S. D. Ohio 1980) (NCAA's TV Plan and contracts must be judged under Rule of Reason).

[9] A second procompetitive effect is that the Plan and contracts increase live attendance at games by reducing the conflict between telecasting and live games. The increase in live attendance preserves the aura and excitement created by crowds, which in turn makes football more attractive (as a live rather than "studio" event) for television viewers, networks, and advertisers. This gate-enhancement justification has been used by Congress repeatedly as the basis of legislation for the protection of attendance at high school, college, and professional football. E.g., S. Rep. No. 1087, 87th Cong., 1st Sess. 2 (1961); H.R. Rep. No. 1178, 87th Cong., 1st Sess. 2-3 (1961); S. Rep. No. 93-347, 83rd Cong., 1st Sess. 3 (1973); H.R. Rep. No. 93-483, 93d Cong., 1st Sess. 7-8 (1973). It is hardly the sort of thing a court may disregard entirely, as the per se rule requires.

appropriate, procompetitive aim? But football entails *both* competition and cooperation. Every game has two teams, and the competition must be balanced or the games will not be attractive. Unless there are many, reasonably equal teams available to be matched on TV, the quality of the "product" furnished to the networks, audience, and advertisers will decline. *Competitive, balanced games are the product the NCAA and its members furnish.* This is why college football is successful in competition with other forms of entertainment. Without balance, output (measured as viewers of games or in any other way) will decline, as people turn to other sources for entertainment. Balance is procompetitive because it enhances output. Joint action produces balance; teams cannot do this alone.[10] Cooperation thus increases competition.

The court of appeals' opinion in this case conflicts with the method of analysis established in this Court's cases and with the holdings of the other circuits (note 8, *supra*) applying the Rule of Reason to sports leagues and associations. The court of appeals rejected (App. A, *infra*, 8a n. 6) the considered view of the United States that existing precedents called for application of the Rule of Reason—a view the United States repeated in this Court in an amicus memorandum discussing the application for a stay. Justice White stated that "the *per se* price-

[10] Respondents argued, in opposing our application for a stay, that the district court found as a fact that the TV Plan and contracts did not promote balanced competition (Response 19-20). This is not so; the court said only that the Plan was not necessary to produce balance and that less restrictive alternatives were available. App. B, *infra*, 70a-71a. The court of appeals took the same position. App. A, *infra*, 10a-15a, 21a-22a. The more important point, though, is that *all* of the factual findings of the district court were infected by its placement of the burdens of proof and persuasion on defendant NCAA. On many issues the only evidence was that produced by the NCAA. The district court rejected the evidence and thus ruled for respondents. With a different allocation of burdens, it should have ruled for the NCAA. We discuss the allocation of burdens at pages 16-19, *infra*. In deciding where the burdens should go, this Court must assume that under a proper allocation the NCAA could establish all of its factual contentions. It is therefore unnecessary for this Court to consider any of the factual disputes between the parties.

fixing holding is questionable to my mind" (App. E, *infra*, 143a). Review by this Court is therefore appropriate.

2. Before adopting the per se approach, the court of appeals surveyed the procompetitive justifications advanced by the NCAA, as *Broadcast Music* requires. It applied the per se rule only after discounting these justifications. The court conducted the survey with its thumb on the scale, though: it held that the per se rule applies unless the defendant establishes not only that its conduct is procompetitive in fact but also that the restraints it has chosen are "necessary" to the achievement of these procompetitive results (App. A, *infra*, 11a & n. 9, 15a; see also 13a & n. 14). The Tenth Circuit applied the per se rule not because the NCAA had failed to advance procompetitive justifications but because it had not convinced the court of their magnitude. (It rejected one, for example, because it was "not unambiguously procompetitive", *id.* at 10a, and it treated others in a similar way).

The allocation of these burdens to the defendant in an antitrust suit is of sufficient novelty and importance to warrant review by this Court. Other courts have held consistently that in antitrust litigation the plaintiff has these burdens, which never shift to the defendant. E.g., *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center*, 684 F. 2d 1346, 1352 n.10 (7th Cir. 1982); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 694 F. 2d 1132, 1136 (9th Cir. 1982) (plaintiff "is wrong in its assertion that once it had proved the existence of a vertical restraint on trade . . . the burden shifted to [defendant] to prove the restriction reasonable"). The court of appeals' decision creates a conflict among the circuits.

The burden allocation question raised here is especially important in characterization cases. How does a court tell when the procompetitive justifications advanced by the defendant call for application of the Rule of Reason? In light of the decisions in *GTE Sylvania*, *Broadcast Music* and *Maricopa*, which require a quick survey of justifications, this has become a difficult question of importance in most antitrust cases.

In other parts of the law, it is settled that the plaintiff has the burden even when the law creates a "presumption" against the defendant. By statute, a presumption "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301. The Tenth Circuit has departed from this statutory treatment of the risk of nonpersuasion, placing it on the defendant.

Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e (1976), offers an illustration of burden shifting. Once the plaintiff makes out a prima facie case, the defendant must articulate proper justifications. Then the burden returns to plaintiff. *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981) (discussing earlier cases); *U.S. Postal Service* v. *Aikens*, 103 S. Ct. 1478 (1983) (reversing a court of appeals for using a burden-shifting analysis after a full trial). Application of this analysis means that the NCAA bears no greater burden than the one of introducing evidence and articulating justifications. See Fed. R. Evid. 301. It discharged this obligation.

The nature of the burden the court of appeals assigned to the NCAA in this case itself warrants attention. The court of appeals required the NCAA to prove that the restraints were "necessary" to achieve the procompetitive benefits. The burden of showing "necessity"—another way of phrasing a "least restrictive alternative" test—puts the defendant to an impossible task. No economic arrangement is necessary in the strict sense, and a court can always imagine some "less restrictive" alternative that, in a hypothetical world, achieves benefits

[11] The court of appeals' only suggestion was that the NCAA might devise some system of pass-over payments for establishing balance among the teams (App. A, *infra*, 21a). It also implied that a television package using nonexclusive rights would be lawful (*id.* at 26a-27a). But these would not work as well as the existing Plan, and they also entail much of the horizontal cooperation that the court thought unlawful per se. Surely the per se rule was not designed for drawing nice distinctions of this sort. Cf. *Broadcast Music*, *supra*, 441 U. S. at 17 n. 27.

without corresponding costs.[11] The most anyone can say is that a restraint is helpful, efficient, cost-reducing, and the like. To require proof of "necessity" is to condemn, period.

This Court has rejected "least restrictive alternative" analysis as a method of identifying per se offenses. In *Broadcast Music* the Court applied the Rule of Reason to the blanket license, a substantial amount of horizontal cooperation. It did so because this form of licensing reduced costs and was accompanied by productive integration. On similar reasoning the NCAA is productive integration, which produces a network series to compete against other shows. Perhaps the NCAA's TV Plan is not "necessary," but neither was the blanket license. The court of appeals in *Broadcast Music*, conducting the Rule of Reason analysis on remand, expressly held the blanket license *not* "necessary" to television networks. *CBS* v. *ASCAP*, 620 F. 2d 930, 937-38 (2d Cir. 1980), cert. denied, 450 U. S. 970 (1981) (blanket license not even a restraint because other ways of licensing may be arranged easily). Similarly, in *Continental T.V.* the Court repudiated an existing per se doctrine and substituted a Rule of Reason analysis, even though it acknowledged that the restraint "was neither the least nor the most restrictive provision" that could have been used. 433 U. S. at 58 n.29. See also the decision on remand, *Continental T.V., supra*, 694 F. 2d at 1138 n.11, expressly rejecting least restrictive alternative analysis. In light of the principle that the per se approach is the exception to the Rule of Reason, justified only by showing that a given practice almost never is procompetitive (*Broadcast Music, supra*, 441 U. S. at 9-10, 19-20), it is impossible to say (as the Tenth Circuit did) that the per se rule must be applied unless the defendant proves the existence of competitive benefits, and the necessity of the particular arrangements, case by case.

In *Jefferson Parish, supra* note 6, this Court has granted review of a decision invoking the per se rule after applying a "least restrictive alternative" analysis. The subject thus is important, and the courts of appeals are in disarray. The Court

should grant review here to consider another facet of the "least restrictive alternative" approach.[12]

3. The cornerstone of the court of appeals' Rule of Reason holding is its conclusion that there is a "market" in college football televised live on Saturday afternoons in the fall. The NCAA's members have a high share of this market, from which the court of appeals inferred market power. The market power in turn made the restraints unreasonable. The definition of the market rested on essentially two propositions: (1) for many viewers, there is no substitute for college football and thus networks must show college football, and (2) advertisers pay more, per viewer, to reach these viewers than they pay for television viewers on average.

The market power question, too, calls for review here. As we have indicated (page 12 *supra*; see also nn. 10, 12 *supra*) it is intimately related to the per se holding. Whether a practice may be justified as useful in competing against other economic units obviously depends on whether such competition is ongoing. The best example of this lies in the Tenth Circuit's treatment of the NCAA's argument that the TV Plan and contracts defined and improved a TV series, the better to compete against other entertainment. The court refused even to consider this justification because, in its view, the inability of

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[12] The Solicitor General has argued (Memorandum Concerning Application for Stay 3-4) that because the Tenth Circuit's Rule of Reason holding is an alternative ground of decision, the Court may not grant review of Questions 1 and 2—despite the fact that, in the Solicitor General's view, the Tenth Circuit erred—unless it is willing to hear the Rule of Reason issues (Questions 3 and 4), which the government views as fact-bound. We obviously think all four issues are worthy of review. Each involves a conflict, and it is best to have a definitive holding resolving the entire litigation. Nonetheless, the Court could take Questions 1 and 2 separately if necessary. The allocation of burdens (Question 2) affects all of the findings of fact under the Rule of Reason; reversal on Question 2 would require further proceedings on the Rule of Reason issues. Moreover, the difference between per se and Rule of Reason liability potentially affects the scope of relief. A per se holding dooms all "exclusive" contracts (and maybe, if respondents are right, all other methods by which the NCAA may package sports TV rights); a properly drawn decree based on a Rule of Reason holding simply strikes down the existing Plan and contracts, leaving new arrangements to new litigation on a new record.

the NCAA's members to sell directly to TV networks, outside the series contract, presented unacceptable risks of cartelization (App. A, *infra*, 12a-14a). Such risks are present, though, only if the NCAA's members are so large in relation to the market that the withholding of games affects prices. If the NCAA is "small" in relation to the market, its activities in packaging a competitive series are consistent with antitrust aims. The per se versus Rule of Reason characterization analysis thus must start (although it cannot end, as *Broadcast Music* shows) with an assessment of market power.

The court of appeals' analysis of market power is fundamentally defective. It makes almost any differentiated product a market unto itself. Mercedes cars cost more than other cars, on average, and many customers are so enamored of them that for those customers Chevrolets are not good substitutes. IBM computers cost more, on average, than other computers, and many customers want an IBM machine even at a premium. One would conclude on such an analysis that Mercedes cars and IBM computers are markets, which Mercedes and IBM monopolize.

This Court rejected analysis of this sort in *United States* v. *E.I. Du Pont de Nemours & Co.*, 351 U. S. 377 (1956), holding that even a product as distinctive as cellophane is not a separate market if many customers find other products to be substitutes. The existence of some customers (cigarette manufacturers) for which only cellophane would do did not define a market. Many other courts, following *DuPont*, have held that distinctive products and committed customers do not identify a market.[13] The decision of the Tenth Circuit conflicts with these other cases.[14]

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[13] E.g., *Calnetics Corp.* v. *Volkswagen of America*, 532 F. 2d 674, 691 (9th Cir.), cert. denied, 429 U.S. 940 (1976); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 277-83 (5th Cir. 1978), cert. denied, 440 U. S. 939 (1979); *Kaplan* v. *Burroughs Corp.*, 611 F. 2d 286, 293-95 (9th Cir. 1979), cert. denied, 447 U. S. 924 (1980); *Reisner* v. *General Motors Corp.*, 511 F. Supp. 1167 (S. D. N. Y. 1981), aff'd on other grounds, 671 F. 2d 91 (2d Cir. 1982); *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801 (N. D. Cal. 1981).

[14] Doubtless the market power question turns on its facts, and in this sense it may be said that there is no square conflict. But we attack the

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The reason for defining a market is to find out whether the defendants have the power to affect price by reducing output. If a court can assess power directly, so much the better. Here the NCAA's power is constrained by the ability of viewers to switch to other entertainments on TV, and more importantly by the ability of advertisers to switch to other TV programs and advertising media if the NCAA tries to raise the price. The fact that for some viewers at some times only football will do does not give the NCAA power, any more than the fact that some people can shop for groceries only on Sunday afternoons gives a supermarket power. Those who can (and do) switch will prevent sellers from raising price. If the NCAA tried to raise price, advertisers would switch to other shows. The evidence shows that even the heaviest advertisers on NCAA football put about 95% of their ads on other programs, establishing that these advertisers have many substitutes. Thus it does not matter much whether the market is sports, TV entertainment, TV advertising, or some other similar group of activities. So long as the appropriate market is larger than college football TV programming on Saturday afternoons in the fall, the NCAA's share is minuscule.

The court of appeals' emphasis (App. A, *infra*, 18a-19a) on the high price paid per viewer, and that per game, demonstrates the problem with its analysis. The court did not say that advertisers pay more per viewer for NCAA football than they do for viewers of other shows, once the demographic characteristics of the viewers are accounted for. Many prime time TV shows and other sports events attract higher advertiser payments per viewer than NCAA football.[15] The court did not say

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principles used by the lower courts, not the facts they found. We do not deny that many viewers find college football unique and that networks thus feel compelled to show college games; the respondents do not deny the data about the prices of ads and how advertisers allocate their spots. The question is wholly legal: what inferences should be drawn from the undisputed facts?

[15] Nielsen data show that in 1976-80 advertisers paid $4.81 per thousand viewers for 30 second NCAA spots. In the same period advertisers paid $5.05 for baseball spots, $5.41 for golf spots, $5.60 for pro football spots, and $7.37 for horse racing spots. There is a similar spread for prime time entertainment.

that the networks or advertisers pay more per game than is warranted by the number of people who watch and the amount of advertising sold. Thus the fact that NCAA football brings handsome prices reflects only that NCAA football is attractive to millions of viewers.

Instead of showing market power, this proves the NCAA's point. The TV Plan and contracts have created popular entertainment, watched by millions. Output (viewers and advertising) is up, not down. The popularity of the games depends in part on the controls at issue in this case, controls that create balance, competitiveness, and product competition. The court of appeals' observation that the games attract many viewers that advertisers want to reach is a tribute to the procompetitive, output-expanding aspects of the arrangements. It is deeply ironic that the court of appeals should turn the success of the NCAA's plan into a reason for antitrust condemnation.

4. Underlying most of the court of appeals' reasoning is a conviction that the NCAA's contracts with the networks reduce competition and output because, once the contracts have been signed, the teams and TV stations do not *thereafter* compete, game by game, for telecast rights. E.g., App. A, *infra*, 7a n. 5, 14a, 16a-17a, 21a-22a. The court of appeals also objected to the "vertical foreclosure" created by the contracts: they exclude some stations and networks from showing some games, and they supposedly give an advantage to the larger buyers. *Id.* at 4a, 14a-17a. In other words, the court used as a model of "competition" the existence of a game by game "spot market" in telecasting rights.

This part of the Tenth Circuit's approach presents still another issue for review, because there is no antitrust reason why competition must take the form of a game-by-game market rather than competition for series contracts. This Court and the courts of appeals have recognized many times that such competition can be as powerful as spot competition in increasing output and improving consumers' welfare.[16] Competition for

[16] *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961); *United States* v. *El Paso Natural Gas Co.*, 376 U. S. 651 (1964); *United*

(*Footnote continued on following page*)

the contract often is particularly effective because it focuses the efforts of both buyers and sellers on a single, intense round of bidding; the greater stakes of a bulk sale or purchase make the competition that much more intense.[17] The Tenth Circuit's view is the opposite: the use of long term or bulk contracts is a *reduction* in "competition."

In this case there was extensive competition for the network contracts. NBC, ESPN, USA Cable, and many smaller networks took part, while ABC, CBS, and Turner competed successfully. In light of the nature and vigor of this competition, it is unsupportable for the court of appeals to conclude, as it did, that these very contracts reduce output and increase the price paid for games on TV (App. A, *infra*, 16a-17a, 21a-22a).[18] If the Plan and contracts were the tools of a monopolist, one would expect to see ABC, CBS, and Turner as the plaintiffs. On the court of appeals' theory, they pay the overcharge, while respondents are the beneficiaries. Yet ABC appeared as *amicus curiae* to defend the contracts, while CBS and Turner supported the NCAA's request for a stay in the Tenth Circuit.

The curious litigating posture of the parties in this case—with the supposed recipients of monopoly profits as the plaintiffs, and the supposed victims (the networks) defending the arrangements—suggests that there is a fundamental flaw in the court of appeals' logic. The court thought competition suppressed; in fact there is more competition. By spreading national and regional TV appearances among more teams, the arrangements promote competitive balance (i.e., help out re-

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States v. *General Dynamics Corp.*, 415 U. S. 486 (1974); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F. 2d 139 (3d Cir. 1981); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F. 2d 119 (7th Cir. 1982).

[17] *Jefferson Parish, supra* note 6, again presents a related question concerning competition for the contract.

[18] Respondents apparently do not endorse the Tenth Circuit's approach fully. In responding to the application for a stay they asserted (Response 26) that ABC has been "the sole beneficiary of the NCAA's monopoly . . .". We find it hard to see how, if the NCAA is a monopolist, the networks as buyers can be the beneficiaries.

spondents' rivals); they increase viewership on TV and live attendance at the stadiums of other universities. They produce the efficiencies associated with the packaging of other television series and enable the networks to compete more effectively against other entertainments. They enable TV stations to deliver football at a lower cost per viewer than alternative production arrangements.

The contracts thus aid viewers, who watch more football overall but do not watch the same games respondents want to telecast. They also aid the colleges. Like any other form of successful competition, they yield greater output, lower costs, and higher profits. The Plan and contracts make a larger pie, for viewers and universities alike. The profits here signal competitive benefits, not monopoly. True, respondents are not receiving slices as large as they wish, but the antitrust laws do not protect the pocketbooks of individual competitors at the expense of consumers. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 487-89 (1977).

In this market competition for the contract helps consumers more than spot market competition would. The buyers compete vigorously, and in order to sell contracts to the networks the NCAA must design a set of rules that offers viewers and advertisers what they want. Buyers have so many other options that the competitive contracting process is bound to increase output, to the benefit of all. The antitrust laws do not prefer spot market competition; still less is competition for the contract "unreasonable." Only by narrowing the "market" to the NCAA's product (rather than sports or entertainment on TV), and overlooking how the bidding process occurs, did the court of appeals characterize this output-expanding arrangement as an unreasonable restraint of trade. The result is important, and it is wrong. Review by this Court is warranted.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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APPENDICES

FILED
United States Court of Appeals
Tenth Circuit
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Clerk

APPENDIX A

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 82-2148

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a public body corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a non-profit corporation,

Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Oklahoma
(D. C. No. CIV-81-1209-BU)

Before BARRETT, LOGAN, and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

This is an appeal from a district court judgment holding the football television regulations of the National Collegiate Athletic Association to be in violation of sections 1 and 2 of the Sherman Act and invalidating contracts entered into between the NCAA and ABC Sports, Inc., CBS Sports, Inc., and Turner Broadcasting System, Inc. The plaintiffs-appellees are The Board of Regents of the University of Oklahoma and The University of Georgia Athletic Association. They want to be

free to contract for the sale of broadcast rights to the football games of their universities. After a nonjury trial, the district court held that under section 1 of the Sherman Act the NCAA's television plan and the contracts are invalid per se because they constitute price fixing and group boycotts, and are also unlawful under rule of reason analysis. The court held that the NCAA violated section 2 by monopolizing the intercollegiate football broadcasting market. 546 F. Supp. 1276 (W.D. Okla. 1982).

To resolve this appeal we consider: (1) whether the plaintiffs suffer antitrust injury and have standing to sue; (2) whether the television plan and contracts constitute price fixing unlawful per se; (3) whether the television plan and contracts are unlawful under rule of reason analysis; (4) whether the plan and contracts constitute group boycotts illegal per se; and (5) whether the relief granted below is overly broad.

The challenged NCAA regulations are found in the "1982-1985 NCAA Football Television Plan." Under the network television contracts entered into pursuant to the plan, ABC and CBS share exclusive first rights to negotiate with NCAA member institutions regarding the live broadcast of football games. In return for these negotiation rights ABC and CBS each guarantees to pay a "minimum aggregate compensation" of $131,750,000 over the four year contract period.[1] The contracts essentially eliminate competition between ABC and CBS for broadcast rights to the same games. *See* 546 F. Supp. at 1292-93. Both ABC and CBS are to broadcast 14 "exposures" per season—seven or eight exposures are one- or two-game national or seminational telecasts and the rest are three- to six-game regional exposures. Within the 14 exposures at least 70 teams are to appear on each network. At least 82 different schools must be featured on each network over the

[1] The "minimum aggregate compensation" fee sets forth the total amount the networks must pay to the individual schools for the rights to particular games. If at the end of the season the minimum has not been paid, the balance is paid to the NCAA.

course of two seasons; the goal is to feature 115 different teams between the two networks. Although the contracts contemplate that most telecasts will be of "major" university (Division I-A) games, they obligate the networks to telecast a few small-college games and Division I-AA, II, and III championship playoff games. The television plan limits schools to six appearances every two years, with a maximum of four appearances the first year and five the second. These appearances must be divided evenly between ABC and CBS. During 1982 and 1983 Turner Broadcasting System, Inc. is permitted to select and cablecast over its Atlanta station games not selected by ABC or CBS. For 19 games each season Turner pays a minimum aggregate compensation of $17,696,000 over the two year contract period. Schools may sell the broadcast rights to their games to ABC, CBS, and Turner only.[2]

I

Relying on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the NCAA asserts that the plaintiffs lack standing to assert antitrust violations because they allege injuries that are not of the type the antitrust laws were designed to redress. The violation claimed by the plaintiffs is that the television plan constitutes a marketwide horizontal price fixing conspiracy. They allege that to facilitate the pricing arrangement individual schools are precluded from exercising independent judgment with regard to output and price. Further-

[2] A minor deviation from this rule is the "exception telecast." Essentially, games that qualify as exception telecasts are those (1) that are sold out or are being played more than 400 miles from the area in which the game is to be telecast, and (2) that will not be telecast within a certain distance of other football games unless those games are sold out. These telecasts occur infrequently and do not affect our analysis of the television plan and network contracts.

more, they allege that the NCAA will expel and boycott institutions that violate the television plan.[3]

In *Brunswick*, the Court stated:

> "[T]hey must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful."

Id. at 489. The television plan at issue here restricts the plaintiffs' revenues, market share, and output; the plan "cripple[s] the freedom of traders and thereby restrain[s] their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951). This effect is potentially inconsistent with the Sherman Act's mandate of free competition and is virtually identical to injuries redressable in the vertical restraint context. Furthermore, compliance with the television plan is coerced by the threat of expulsion and boycott, sanctions which clearly have anticompetitive potential.

Although many of the injuries alleged by the plaintiffs are in the nature of vertical restraint injuries rather than the allocative efficiency/deadweight loss classically attributed to cartelization, we think the plaintiffs have standing to challenge the plan as a horizontal pricing conspiracy. The standing limitation expressed by *Brunswick* does not apply with full rigor to the instant case. *Brunswick* was an action for treble

[3] Although the boycott claim presents a double contingency—the plaintiffs must sell broadcast rights in violation of the television plan and the NCAA must boycott the plaintiffs—the claim is ripe. The plaintiffs have adequately evidenced their desire to be free of the restrictions; indeed, Oklahoma executed a contract for the broadcast of its games. Also, the NCAA has publicly threatened to sanction institutions that violate its television plan. *See* 546 F. Supp. at 1286, 1302.

damages; here the plaintiffs seek injunctive relief only.[4] Section 16 of the Clayton Act states that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. The plaintiffs allege antitrust injury inextricably intertwined with a horizontal price fixing conspiracy. *See Blue Shield of Virginia v. McCready*, ____ U.S. ____, 50 U.S.L.W. 4723, 4726-28 (June 21, 1982). Inasmuch as the plaintiffs may challenge the clauses of the television plan that injure the members of the conspiracy, no valid reason appears why they should be foreclosed from challenging clauses that injure the victims of the conspiracy. The statute evinces no such limitation, and we are not inclined to engraft one upon it. To do so would hinder the congressional policy of eliminating artificial restraints from the marketplace. *See Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); *In re Multidistrict Vehicle Air Pollution Litigation*, 481 F.2d 122, 130-31 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); 2 P. Areeda & D. Turner, *Antitrust Law* § 335e (1978). *Cf. Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 260-61 (1972) (State of Hawaii as parens patriae).

We are not persuaded by the NCAA's contention that the plaintiffs are merely seeking a "bigger slice of the [cartel] pie" or are seeking to "promote internal cartel management" by reforming the cartel "so that the cartel members may obtain their benefits while avoiding their burdens." *See* Appellant's Brief at 53. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), similar arguments were made and rejected. In that case, the plaintiffs were Midas franchisees who

[4] *Brunswick* does not mandate the result sought by the NCAA for another reason. In *Brunswick* a vertical merger prevented Pueblo Bowl-O-Mat, Inc. from reaping profits that would have accompanied an increase in market concentration. Pueblo sued for those profits, alleging that the merger was unlawful. The Court denied recovery, stating that the lost profits Pueblo would have derived from a decrease in competition were not injury of the type the antitrust laws were intended to prevent. 429 U.S. at 489. Here, the plaintiffs seek the right to compete in a market free from artificial restrictions.

alleged that certain clauses in the franchise agreement were illegal. The Court stated:

> "Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. The argument that such conduct by petitioners defeats their right to sue is completely refuted by the following statement from *Simpson* [*v. Union Oil Co.*, 377 U.S. 13 (1964)]: 'The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws.' "

Id. at 139-40. That the plaintiffs recognize the need for and accept the NCAA's regulation of intercollegiate athletics does not preclude their suit to challenge the television plan as violating the antitrust laws. We think that the allegations of the plaintiffs reflect antitrust injury and confer standing to sue under 15 U.S.C. § 26.

II

At the outset we must determine whether the NCAA's television plan and the network contracts constitute price fixing illegal per se under section 1 or whether they should be scrutinized under the rule of reason. The district court found them illegal per se. 546 F. Supp. at 1311. The nearly 600 institutional members of the NCAA, which include all "major" football powers, have agreed to market all of their football games to be offered for television viewing exclusively through

the NCAA. By this agreement the teams have restricted the number of games to be telecast per season. The NCAA has negotiated fixed minimum total prices for the packages, which apparently have also always been the maximum. Although in theory the networks can pay different prices for different games, in practice the compensation paid does not vary from game to game.[5]

To the extent that the provisions of the television plan are naked attempts to restrict output and manipulate price, they are illegal per se under *Arizona v. Maricopa County Medical Society*, ____ U.S. ____, 50 U.S.L.W. 4687 (June 18, 1982). The NCAA argues, however, that the restraints are not naked but accompany an integration of functions, that the restraints should be scrutinized under *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), and therefore that the restraints should be analyzed under the rule of reason. While the NCAA is correct in asserting that *Broadcast Music* applies to restraints accompanying integrations, it incorrectly argues that *Broadcast Music* necessarily precludes application of the per se rule. Rather, the inquiry under *Broadcast Music* is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" 441 U.S. at 19-20. "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason or else we should apply the

[5] Because the networks possess exclusive rights to negotiate with the schools, the establishment of the minimum fee ensures that the schools will receive a "reasonable" payment for the broadcast rights. However, the fee also eliminates any incentive on the part of the networks to reward games of greater merit with higher payments. This effect does not necessarily reflect anticompetitive price enhancement (price fixing/allocative inefficiency in the economic sense), but it does reflect a distortion of free market forces.

rule of reason from the start." *Id.* at 19 n. 33 (citation omitted).[6]

Under *Broadcast Music*, price restraints accompanying a partial integration escape per se invalidation only when the integration "render[s] markets more, rather than less, competitive" and when the restraints are properly ancillary to the integration. In other words, "[t]he parties must be cooperating in an economic activity other than the elimination of rivalry,

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[6] The United States' amicus brief suggests that because the trial court scrutinized the procompetitive justifications proffered by the NCAA, it employed a form of rule of reason analysis. The brief argues that it is improper to characterize a case as "per se" after assessing and rejecting proferred justifications. *Broadcast Music* holds otherwise. Permitting facial consideration of attempts to justify restraints accompanying partial integrations does no violence to the concept of per se rules. Essentially, per se rules were developed in the interest of litigation efficiency.

> "*Per se* rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases."

United States v. Container Corp. of America, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting). *See also Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958); *Arizona v. Maricopa County Medical Society*, ____ U.S. ____, 50 U.S.L.W. 4687, 4690 & n.14 (June 18, 1982). In the context of restraints ancillary to integration, however, it cannot be said that in the aggregate "the gains from imposition of the rule will far outweigh the losses." The integration of productive activities may permit efficiencies of scale regarding research, advertising, and manufacturing; output may be enhanced; new entry into various markets may be facilitated. *See* Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1527-29 (1982). R. Bork, *The Antitrust Paradox* 263-66 (1978); L. Sullivan, *Handbook of the Law of Antitrust* § 77, at 207 (1977). Cases applying the per se rule to naked price restraints confirm that in some circumstances price restraints ancillary to an integration of functions will escape the per se rule. "If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price fixing agreement among the doctors would be perfectly proper." *Maricopa County*, 50 U.S.L.W. at 4693.

and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose." R. Bork, *The Antitrust Paradox* 279. *See also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899); *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 185-92 (S.D.N.Y. 1960); L. Sullivan, *Handbook of the Law of Antitrust* § 131. Our analysis of the television plan and contracts, including a comparison of these agreements to the arrangements in *Broadcast Music*, leads us to affirm the district court's conclusion that the plan and contracts constitute per se illegal price fixing. The NCAA television arrangement is so fraught with anticompetitive potential that it "appears to be one that would always or almost always tend to restrict competition."

A

The NCAA is essentially an integration of the rulemaking and rule-enforcing activities of its member institutions. It performs many functions for its members, many of them noncommercial. It is the guardian of amateurism in the athletic programs of its members in essentially all intercollegiate sports. The NCAA determines playing rules, sets eligibility requirements, regulates recruiting, and establishes the requirements for and the number of scholarships that may be offered. It establishes when the seasons may start and must end, determines the number of games that may be played, and fixes the number of coaches a team may have. One sanction often levied for violation of these rules is the restriction of television appearances. The NCAA argues that the television plan is ancillary to this cooperative activity because the restraints promote the effectiveness of the cooperation by protecting live attendance at games and by promoting competitive balance, thereby improving the excitement of and the interest in both televised and live games.

The first argument, that the restraints promote rather than restrict output by protecting live attendance, does not qualify the restraints as ancillary. The NCAA argues that in the process of "manufacturing" football, two products are produced that are marketed to different consumers: the right to attend a game, which is sold to spectators, and the right to televise a game, which is sold to broadcasters. The NCAA contends that by restricting the sale of broadcast rights, consumption by spectators is increased.[7] We doubt on its face the argument that the output may be properly characterized as viewership. Even if we assume that consumption or viewership may be considered to be output, we think that total viewership—both live and televised—must be considered. An argument that total viewership is enhanced by restricting the sale of broadcast rights is speculative. The record contains some evidence that supports the conclusion the plan enhances live viewership, but no evidence was adduced to permit the court to gauge total viewership.[8] Finally, even if the television plan has the effect of promoting spectator consumption, this effect is not unambiguously procompetitive. It is at best competitively neutral. The plan promotes live attendance by restricting the availability of other options. It potentially creates inefficiencies, such as the reduced output of desired products and the increased consumption of less desirable products. Therefore, the restraints do not increase the efficiencies of the integration.

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[7] Another twist on this argument is that promoting spectator consumption ensures that gate receipts will be large enough to enable institutions to fund football and other athletic programs. It is argued that in this manner the plan ensures an adequate number of teams to permit intercollegiate competition. To a certain extent, this argument is not unlike the contention that something other than competition is needed in the industry. Such an argument is not permitted under the Sherman Act. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689, 696 (1978). If a market structure other than competition is necessary to engage in a line of commerce, Congress must be petitioned for an exemption from the antitrust laws.

[8] The district court ultimately rejected the argument that the plan enhances live viewership. 546 F. Supp. at 1295-96.

The second argument, that the restraints promote athletically balanced competition, also fails to meet the ancillarity test. First, this appears on its face to be a noneconomic justification. Noneconomic considerations, however worthy, cannot be used to justify restraints that adversely affect competition. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-96 (1978). Furthermore, as the district court noted, the argument that the restraints are necessary to promote athletic balance shades into the argument that competition will destroy the market. *See* 546 F. Supp. at 1310. The Sherman Act will not countenance an argument that the nature of a product or an industry structure is such that something other than competition is desirable. *National Society of Professional Engineers*, 435 U.S. at 689, 696. And, even if we assume the justification to be legitimate, the district court found on adequate evidence that any contribution the plan made to athletic balance could be achieved by less restrictive means.

The restraints contained in the television plan do not increase the efficiency of the rulemaking integration and are broader than necessary to achieve asserted procompetitive goals. Therefore, they are not ancillary to the rulemaking integration and do not escape per se invalidation under *Broadcast Music* on the basis of that integration.[9]

B

The NCAA also asserts that the television plan is ancillary to an integrated marketing arrangement. It argues that the restraints enable NCAA football to be marketed as a television series and improve its competitive position against other television programming. Essentially, the television plan contains two groups of restraints, those that create an exclusive franchise

[9] The trial court's findings suggest that it placed the burden of proving the effectiveness and necessity of these restraints upon the NCAA. We believe that is the proper placement of the burden when considering whether to apply per se or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration.

arrangement with the networks and those that distort the prices paid for the individual games.[10] Under the plan, ABC, CBS, and Turner share the exclusive right to broadcast NCAA football. The grant of exclusivity restricts the buyers to whom schools may sell and prevents other broadcasters from purchasing broadcast rights. In connection with the exclusive rights the NCAA established a price—the minimum aggregate compensation fee. Both the grant of exclusivity and the setting of the minimum aggregate compensation price appear anticompetitive: exclusivity creates the risk of foreclosure of competition and price setting implicates monopoly power.[11]

The NCAA attempted to prove that the exclusive franchise restraints were necessary to penetrate the network programming market.[12] The NCAA asserts that the restraints permit college football to be promoted as a series, like "Dallas" or "M*A*S*H," in competition with other television programming. In essence, the NCAA is arguing that the plan restrains intrabrand competition (competition among football games) in order to stimulate interbrand competition (competition between NCAA football and other entertainment programming).[13] Stimulating interbrand competition at the expense of

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[10] The price-distorting restraints, articles 10 and 13 of the television plan, relate to fostering athletic balance and enhancing live viewership—arguments rejected above.

[11] The establishment of a minimum aggregate compensation is a necessary incident to the conferral of exclusive rights: it prevents the networks from abusing their position vis-a-vis the individual schools. Therefore, in cases in which the granting of an exclusive right is appropriate, the setting of a price for that exclusive right may also be appropriate.

[12] The evidence consists largely of the testimony of Paul Klein. Klein testified that football would constitute viable network programming only if the network and advertising sponsors were granted exclusivity. That is, the networks would be unable to attract advertising sponsors if football programming competed head-to-head with other football programming. According to Klein, the plan's effect of permitting schools to sell only to ABC, CBS, and Turner is essential to the joint marketing arrangement.

[13] This argument assumes that NCAA football may be viewed as a single brand, a product of the joint venture rather than of the individual schools, and that football is in the same product market as other television programming. Upon the facial examination appropriate in the per se context these assumptions appear unlikely to be true.

intrabrand competition is potentially procompetitive. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-57 (1977). It can result in a more vigorous marketing of the product, facilitating market penetration and increasing market share. Because the marketing integration could increase interbrand competition, the NCAA argues that the integration and its accompanying restraints should be assessed under the rule of reason.

Whether stimulating interbrand competition by restraining intrabrand competition is procompetitive depends in part on the nature of the interbrand product market. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 52 n.19; ABA Section of Antitrust Law, *Vertical Restrictions Limiting Intrabrand Competition* 60-71 (Monograph No. 2, 1977). Therefore, it is difficult to assess the validity of the NCAA's argument without getting into the "enormous complexities of market definition that the per se rule seeks to avoid." R. Bork, *The Antitrust Paradox* 269. *Broadcast Music* makes clear that in assessing the facial validity of an integration, courts are not to engage in rule of reason analysis. 441 U.S. at 19 n.33. Yet we need not fully explore the plan's effect on the interbrand market because we conclude that the marketing integration itself is so fraught with anticompetitive potential that it must be considered invalid per se.[14] A comparison of the integration in *Broadcast Music* with the integrated marketing scheme in the instant case highlights the anticompetitive risks that inhere in the television plan and network contracts.

As did the performing rights societies in *Broadcast Music*, the NCAA offers a product—exclusive broadcast rights to all NCAA games—that is different from that which the individual schools could offer. However, unlike the blanket license at issue

[14] This conclusion, of course, obviates the necessity of examining whether the plan's restraints enhance the effectiveness of the marketing integration or are no broader than necessary for that purpose. When an integration is itself impermissible, the restraints justified as accompanying it are likewise impermissible.

in *Broadcast Music*, the new and different product in this case comes at the expense of the product that would otherwise be offered by the schools. In *Broadcast Music*, the copyright holders retained the right to negotiate individual contracts: they could sell outside the blanket licensing arrangement. Under the television plan at issue here schools are not permitted to sell outside the network contracts. Not only does this restraint inhibit the freedom of the individual schools, it also poses a greater risk of cartelization than was present in *Broadcast Music*. There, the right of the copyright holders to sell outside the blanket licensing arrangement ensured the presence of potential competition to inhibit the exercise of market power by the performing rights societies. Here, every producer of commercially salable intercollegiate football is bound to sell through the television plan only. There is no potential competition from producers of intercollegiate football. Furthermore, the contracts restrict the total number of games to be broadcast; the district court found that more games would be shown in the absence of the controls. The television plan also poses vertical anticompetitive risks that were not present in *Broadcast Music*. The rights to NCAA football are sold on an exclusive basis whereas an unlimited number of blanket licenses were offered for sale in *Broadcast Music*. Unless there exist readily available substitutes for NCAA football, then, the television plan creates substantial vertical foreclosure. Moreover, because the football rights are sold only as a package, those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market. The television plan and network contracts pose substantially greater anticompetitive risks than were present in *Broadcast Music*.

C

In summary, the plan on its face suppresses product diversity and restricts output. It poses substantially greater risks of cartelization and vertical foreclosure than were present in

Broadcast Music. The price distorting restraints are broader than necessary to promote the efficiencies of the integration. And while the ancillarity of the exclusive franchise restraints cannot be fully assessed without a rule of reason inquiry, the plan contemplates an impermissible integration: a combination of virtually all the producers, actual or potential, of a differentiated product—commercially salable intercollegiate football. In these circumstances we conclude that the television plan is one "that would always or almost always tend to restrict competition and decrease output." 441 U.S. 19-20. We affirm the district court's ruling that the television plan constitutes per se illegal price fixing.[15]

III

Although we have upheld the trial court's judgment that the NCAA's television plan and the network contracts are illegal per se, we consider them under rule of reason analysis. We do so because given the state of the record and the prospect of review by the Supreme Court, scrutinizing the plan and contracts under the rule of reason promotes litigation efficiency. The trial court held that the plan failed under rule of reason analysis, and we affirm that conclusion.

In assessing the television plan under the rule of reason, the district court applied the test formulated in *Standard Oil Co.*

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[15] To the extent that the procompetitive justifications offered by the NCAA do not relate to an integration, but are offered to show the generally procompetitive nature of the television plan, they are foreclosed by *Maricopa County.*

> "The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application."
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> ____ U.S. at ____, 50 U.S.L.W. at 4692 (footnote omitted).

of New Jersey v. United States, 221 U.S. 1 (1911), which prohibits contracts that are "unreasonably restrictive of competitive conditions." *Id.* at 58. "Unreasonableness under [the *Standard Oil*] test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978) (footnote omitted). Determining whether arrangements are by their nature or character unreasonable requires assessment of the restraints in the context of the market in which they operate.

> "[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

The television plan has a substantial impact on the structural characteristics of competition for the sale and purchase of intercollegiate football television rights. First, NCAA members are permitted to sell the broadcast rights to their games in accordance with the television plan only. There is only one vendor of intercollegiate football broadcast rights in the market; therefore, there exists no price competition among the schools for the sale of broadcast rights. Second, the broadcast rights are sold to three buyers: ABC, CBS, and Turner share the rights to broadcast NCAA football games. The rules set out in article 10 of the television plan restrict price competition among these buyers with regard to the rights to individual games. The plan therefore increases concentration in the marketplace in which broadcast rights to intercollegiate football are bought and sold: the market is composed of one seller and three

buyers. There is no price competition among schools or among the buyers once contracts have been awarded. Furthermore, because the broadcast rights are sold only as a package, if a broadcaster does not have the financial ability to bid for the entire package or does not want the entire package, it cannot purchase football rights except within the narrow constraints of the exception telecast. Therefore, the number of broadcasters that can seek to become buyers of NCAA football broadcast rights is limited. This creates a potential for vertical foreclosure because only certain broadcasters have the resources necessary to become buyers of NCAA football rights.

The television plan has broader market implications than merely limiting the number of buyers and sellers of televised NCAA football. The plan presents marketwide anticompetitive risks of both a horizontal and a vertical nature. The horizontal risk is cartelization, with its accompanying supracompetitive pricing. Because the injuries that inhere in cartelization are incurred only if the NCAA possesses market power, whereas the asserted marketing efficiencies of the television plan are achievable in the absence of such power, scrutiny of the cartelization risk requires assessment of market power. The vertical anticompetitive risk is that potential buyers are foreclosed from purchasing a product for which no satisfactory substitute exists. Assessing this risk requires an analysis of readily interchangeable substitutes, an inquiry subsumed by an analysis of market power. Therefore, gauging the television plan's net effect on competition requires an assessment of market power.

Market power is the power to control prices or exclude competition. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Whether market power exists or can be exercised in the relevant geographic market depends upon the existence of competing products to which a purchaser can turn when faced with relative price increases. Whether product competition exists is determined by two factors:

> "(a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical characteristics, or (ii) can be put to use for the same purpose.
>
> (b) The cross-elasticity of demand, i.e., the extent to which consumer preference shifts freely between two or more products."

2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 6G.04[1] (1982) (emphasis omitted). The "market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. at 404. *Accord United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). We look, then, to the ready availability of substitutable products.

The district court concluded that NCAA football constitutes a unique type of Saturday afternoon programming. This conclusion has adequate evidentiary support in the record. In terms of audience share NCAA football dominates Saturday afternoon programming. Furthermore, the cost per viewer for advertising time during NCAA football telecasts is more than 2½ times greater than the average per viewer cost for other programming. This presumably is caused by the unique demographic makeup of the viewers of NCAA football—persons in middle to upper income brackets and college graduates. The characteristics of the programming most often scheduled opposite NCAA football—comedies, cartoons, and old movies—support the inference that NCAA football is unique in its time slot. Testimony at trial indicated that such programming does not appeal to the same audience; it does not seem to be readily interchangeable for NCAA football. Even professional baseball, which is broadcast opposite NCAA football during September, apparently is not readily inter-

changeable. The evidence showed that the cost per 1000 households for baseball advertising was $3.04, compared with $5.35 for NCAA football. In 1980, a 30-second advertising spot on NCAA football cost $47,900, compared with $17,100 for baseball. The demographics also vary significantly: the NCAA's share of households having income greater than $15,000 was twice baseball's share of these households. Professional football, which is perhaps the most logical substitute for NCAA football, is effectively precluded by the terms of its limited antitrust exemption from being broadcast on Saturday afternoon during the NCAA football season. *See* 15 U.S.C. §§ 1291, 1293, 1294. Another indication that NCAA football is a unique form of Saturday programming is that when ABC had the exclusive right to televise, CBS "went dark" rather than compete against NCAA football—CBS offered no network programming but instead left its affiliated stations to fend for themselves. The record supports the trial court's conclusion that, considering price, use, and quality, NCAA football is a product for which there are no readily available substitutes.

It is true, as the NCAA argues, that the networks' willingness to pay supracompetitive prices is limited by their ability to recover the payments from advertisers. This does not arrest the inference that the NCAA has market power, however. Even if advertisers are willing, in the face of relative price increases, to substitute across different days of the week or across different programming, the networks cannot freely do so; they need programming to offer on Saturday afternoon. Furthermore, even if at current price levels both the networks and the advertisers consider other programming to be readily substitutable for NCAA football, the conclusion that the NCAA has market power is not foreclosed. The NCAA may already be pricing at supracompetitive levels and extracting supracompetitive profits, thereby making otherwise nonsubstitutable products attractive because prices are artificially high. *See* L. Sullivan, *Handbook of the Law of Antitrust* § 16, at 56-57.

To inquire into market power in rule of reason cases is not to invoke a section 2 monopolization inquiry. In monopolization cases the court searches for the degree of market power possessed by a firm with an extremely large market share. *See* 2 E. Kintner, *Federal Antitrust Law* § 12.6, at 352, 356-57 (1980) (collecting cases and noting that market share must approach 80% of the revelant market). Under the rule of reason, a more modest degree of power is sufficient. Therefore, any concern that the market definition may overstate power may be assuaged by attributing less significance to the market share possessed. L. Sullivan, *Handbook of the Law of Antitrust* § 17, at 61. The district court found that the NCAA controlled virtually 100% of the relevant market, televised college football. *See* 546 F. Supp. at 1319-23. Even assuming that the market definition is too narrow, the NCAA's total control over televised intercollegiate football, when combined with NCAA football's apparent uniqueness from the perspective of broadcasters, supports the inference that the NCAA possesses some degree of market power.[16] Because the NCAA possesses market power the risks of cartelization and price enhancement are imminent. Also, because there exist no readily available substitutes for NCAA football the television plan creates substantial vertical foreclosure. Both these results are anticompetitive.

The NCAA seeks to justify the restraints contained in the plan by asserting that they promote athletically balanced competition among the schools and that they are necessary to penetrate the network programming market. As noted above,

[16] The NCAA makes no separate argument urging reversal of the trial court's monopolization holding under section 2 of the Sherman Act. It notes the court's conclusion that the relevant market was the sale of rights to televise live college football games, in which the NCAA "obviously has the dominant share." Appellant's Brief at 10. The NCAA refers to its market definition argument, contending only that is does not possess market power and not that such power if possessed was lawfully obtained. Because of this and our disposition of the section 1 issues, we do not consider the monopolization claim. A reversal of the court's section 2 ruling would not affect the scope of relief granted.

these assertions do not overcome the anticompetitive effects of the restraints. The trial court found that the disparity in revenues between schools can be reduced by means that do not threaten to cartelize the market or to restrict the number of buyers and sellers of NCAA football. A properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues is one possibility. *See White Motor Co. v. United States*, 372 U.S. 253, 270-71 (1963) (Brennan, J., concurring); *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821, 828-29 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *United States v. Topco Associates, Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,391, *modified*, 1973-1 Trade Cas. (CCH) ¶ 74,485 (N.D. Ill.), *aff'd mem.*, 414 U.S. 801 (1973); ABA Section of Antitrust Law, *Vertical Restrictions Limiting Intrabrand Competition* 20-25 & n.63 (Monograph No. 2, 1977). Furthermore, the district court found that without the restraints imposed by the television plan more games would be shown at the local level. 546 F. Supp. at 1307. This would have the effect of equalizing revenues. To whatever extent the television plan reduces the disparity of revenues devoted to football and other athletic programs, the same result can be accomplished by means that do not violate the antitrust laws.

The television plan's contribution to penetrating the network programming market does not save the plan under the rule of reason. The district court concluded that there exist no readily available substitutes for NCAA football. This being the case, there is no interbrand competition in the network programming market to prevent the NCAA from extracting supracompetitive prices. Consequently, the removal of intrabrand competition among the schools totally eliminates price competition from the market. Finally, we note that the plan's restrictions affect NCAA Division I-A universities almost exclusively since they are the ones whose games might be commercially salable. Fewer than 100 schools fall within

Division I-A; of these, 61 are members of the College Football Association, which has strongly manifested its displeasure with the television plan. *See* 546 F. Supp. at 1324-25. The district court concluded on adequate evidence that the 61 schools' ultimate decision to submit to the restraints in the television plan was the product of fear of NCAA sanctions, in football and other sports. *Id.* It is apparent that the schools whose games are used to penetrate the network programming market are not pleased with the cost at which this penetration is achieved. Rather, the district court concluded that the NCAA used its dominance in the regulation of intercollegiate athletics to obtain control of broadcast rights to intercollegiate football. In these circumstances we are not particularly disposed to consider the plan's impact on competition within the larger network programming market to be redeemingly procompetitive.

We affirm the district court's conclusion that the television plan is unreasonably restrictive of competitive conditions and therefore unlawful. It increases concentration in the marketplace; it prevents producers from exercising independent pricing and output decisions; it precludes broadcasters from purchasing a product for which there are no readily available substitutes; it facilitates cartelization. Against this array of antitrust injuries the NCAA's justifications are insufficient.

IV

We agree with the NCAA that the trial court erred in holding that the television plan and network contracts constitute a group boycott illegal per se under section 1 of the Sherman Act. The court reasoned:

> "NCAA members have agreed not to sell their product—football games—to certain buyers. Every broadcast and cable network in the country, other than ABC, CBS and

> TBS, are being boycotted. Further, those local broadcasters which are not affiliated with ABC or CBS are allowed to buy football games only in very limited circumstances."

546 F. Supp. at 1312. However, the NCAA television plan and contracts lack a necessary predicate to the existence of an illegal boycott. "The crucial element is an effort [by one competitor] to exclude or cause disadvantage to one or more [of its] competitors by cutting them off from trade relationships which are necessary to any firm trying to compete." L. Sullivan, *Handbook of the Law of Antitrust* § 91, at 260. *See also id.* § 83. The television plan and contracts do not constitute an attempt by NCAA members to shield themselves from competition offered by broadcasters: broadcasters are not in competition with NCAA members. The market relationship between the NCAA and the television industry is vertical. There is no contention here that the successful broadcasters have conspired with the NCAA to seek the exclusive arrangements in order to freeze out their competitors. The exclusivity features were used by the NCAA to extract the highest possible prices from the networks. The opportunity to purchase the rights to the NCAA football package was offered to all broadcasters. That certain networks were unsuccessful bidders, or did not bid at all, does not turn the contracts into boycotts.[17] Given the vertical market relationship between the NCAA and the broadcasters and the open opportunity to bid for the package, on its face the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level.

The cases cited by the district court do not compel a different conclusion. In *Klor's, Inc. v. Broadway-Hale Stores,*

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[17] Because the rights were sold as a package only, broadcasters who lacked the financial resources necessary to purchase the package were foreclosed from bidding. We need not decide whether this constitutes an unlawful restraint under other antitrust theories; it does not implicate the per se rule against boycotts.

Inc., 359 U.S. 207 (1959), a retailer induced wholesalers and manufacturers to refuse to supply its competitor. In *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), clothing manufacturers organized a boycott of retailers who dealt in the clothing of competing manufacturers. In *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), manufacturers of gas heaters coerced an adverse "seal of approval" decision with regard to the product of a competitor. Each of these cases reflects conduct by one firm inducing concerted action to deprive competing firms of necessary trade relationships, a characteristic absent here. We conclude that the NCAA's practices do not constitute a boycott of the networks not awarded broadcast rights.

The district court also held that by threatening to sanction schools that violated the television plan, the NCAA threatened a per se illegal boycott of those schools. 546 F. Supp. at 1295. Again we disagree. In the context of associational activities, the existence of an expulsion sanction does not by itself constitute a boycott. Unless resort to the expulsion sanction constitutes a naked attempt to exclude competition, the antitrust implications of an expulsion sanction turn on the competitive reasonableness of the rule being enforced. 2 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* § 61.02; L. Sullivan, *Handbook of the Law of Antitrust* § 88, at 247-48. *Cf. United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-85 (5th Cir. 1980) (multiple listing service membership rules assessed for competitive reasonableness even though the rules effectively excluded certain realtors from membership); *Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc. v. Florist's Telegraph Delivery Association*, 371 F.2d 263, 267-69 (7th Cir. 1967) (membership rules that caused members of defendant association to cease dealing with plaintiff scrutinized for competitive reasonableness). An association's rule or practice can in certain circumstances be considered

facially unreasonable, *see Fashion Originators' Guild; Radiant Burners; Associated Press v. United States*, 326 U.S. 1 (1945), and thus can be summarily invalidated as an illegal boycott. However, when, as here, the reasonableness of the practice cannot be assessed summarily, it is improper to affix the label "boycott" and end all inquiry unless the proferred rule-enforcement justification appears to be merely a sham for some anticompetitive purpose. *See North American Soccer League v. National Football League*, 670 F.2d 1249, 1258-59 (2d Cir.), *cert. denied*, ____ U.S. ____, 51 U.S.L.W. 3440 (Dec. 6, 1982); *United States Trotting Association v. Chicago Downs Association, Inc.*, 665 F.2d 781, 787-90 (7th Cir. 1981) (en banc); *Smith v. Pro Football, Inc.*, 593 F. 2d 1173, 1177-82 (D.C. Cir. 1978); 2 J. Von Kalinowski, *Antitrust Law and Trade Regulation* §§ 60.03(4), 6I.02, 6I.07[2]. The NCAA's expulsion sanction appears to be an enforcement mechanism and not a sham for an anticompetitive purpose. We have affirmed the trial court's ruling that the NCAA's television plan is illegal; hence, we need not assess the competitive reasonableness of the expulsion sanction in the context of the plan.

V

The NCAA contends that the injunction granted by the trial court should be modified because it is too vague and too broad. The plaintiffs agree that standing alone the injunction is lacking in specificity and is overly broad, but argue that read in light of the violations found by the district court the injunction is proper. The NCAA specifically challenges paragraphs one, three, and four:

> "(1) The right to telecast college football games is the property of the institutions participating in the games, and that right may be sold or assigned by those institutions to any entity at their discretion;
>
> . . . .

(3) National Collegiate Athletic Association, its officers, agents and employees, shall be and hereby are enjoined from enforcing or attempting to enforce the provisions of the contracts above described and from making any other contract of similar kind or nature in the future;

(4) National Collegiate Athletic Association, its officers, agents or employees, shall be and hereby are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games."

The NCAA argues that the phrase in paragraph three, "other contract of similar kind or nature in the future," is vague and could be read to prohibit the NCAA from arranging for the broadcast of championship tournaments in Divisions I-AA, II, and III. It also argues that paragraph three can be construed to bar arangements that it contends are lawful, such as a membership-wide contract with opt-out and pass-over payment provisions, or blackout rules. Finally, the NCAA contends that paragraph four could be read to prevent the NCAA from imposing sanctions for violations of non-television regulations and to prevent it from reserving Friday night for high school football only.

We hold that the NCAA should present its concerns regarding these paragraphs to the district court. Nevertheless, we comment on some of the arguments as an aid to the district court on remand. Paragraph four might be construed to prevent the NCAA from imposing television sanctions on schools that violate regulations unrelated to the television plan.[18] Paragraph four might also be read to preclude the NCAA from prohibiting games on Friday night. Neither of

[18] The athletic director of the University of Southern California has stated that paragraph four has this effect. *See* Sports Illustrated, Sept. 27, 1982, at 9, 12.

these effects is warranted by the violations found. Furthermore, paragraphs one and four appear to vest exclusive control of television rights in the individual schools. While we hold that the NCAA cannot lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case. The NCAA's arguments regarding the specificity and self-sufficiency of the injunction should also be addressed by the district court.

We REMAND to permit the district court to consider its injunction in light of the views expressed in this opinion. In all other respects consistent herewith the judgment of the district court is AFFIRMED.

BARRETT, Circuit Judge, *dissenting:*

I would reverse the judgment of the district court, quash the injunction and hold that the NCAA television regulations and contracts are valid and lawful. It is my view that the district court's findings, affirmed by the majority opinion, that the NCAA television contracts, and its adjunct rules, constitute *per se* price fixing violations under 15 U.S.C. § 1 (1976) and monopolization violations under 15 U.S.C. § 2 (1976) are clearly erroneous. I am convinced that although there is evidence to support the trial court findings, my review of the entire evidence leads me to a firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U. S. 64 (1948).

I.

In concluding that the NCAA television contracts constitute *per se* price fixing violations, the district court found, *inter alia*: (a) that although it is true that membership in the NCAA is voluntary in the sense that a member institution may withdraw from the NCAA at any time, still, as a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program; (b) NCAA membership is not voluntary for Oklahoma and Georgia, or for many other member institutions for which athletic excellence is an institutional priority; (c) college football is a business, operated by professionals and, like any business, the schools participate in intercollegiate football to maximize revenue and minimize expense "while at the same time maintaining the level of quality which makes their product attractive to the buying public"; and (d) even though Oklahoma and Georgia properly challenge the NCAA television contracts as violative of the antitrust laws causing them injury, still they "believe that NCAA has an important role in regu-

lating such matters as the rules of play, standards of amateurism and academic eligibility."

In concluding that college football is a business operated by professionals to maximize revenue and minimize expense, the district court specifically found:

> Oklahoma's intercollegiate football program has, over the years, produced many outstanding and highly-ranked teams. Oklahoma is capable of attracting large national television audiences for its televised games. Football is the only sport sponsored by Oklahoma which actually generates revenue beyond the costs of fielding a team. The profits generated by the football team support all of the other sixteen men's and women's sports in which Oklahoma participates. In recent years, these programs have become more and more expensive to maintain due to increasing costs and the expansion of athletic programs for women. As a result, Oklahoma seeks to maximize its revenues from football television. Like Oklahoma, Georgia has compiled a record of outstanding success with its intercollegiate football program, and football is the major revenue producing sport for Georgia. Budgetary pressures have forced cuts in Georgia's athletic program, including the elimination of its intercollegiate wrestling program. Georgia also seeks to maximize the revenues generated from the televising of its football games.

Board of Regents v. NCAA, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982).

These findings do not address the purposes and objectives of the NCAA, *i.e.*, preserving a competitive balance in intercollegiate athletics, insuring the amateurism of college athletics and avoiding the aura of professional sports. It is my view, as set forth more fully hereinafter, that the NCAA television plan's primary purpose is not anti-competitive. Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of

the key purposes is to insure that the student athlete is fully integrated into academic endeavors. These are the "redeeming virtues" which did not impress the trial court or the majority. They are so compelling, in my opinion, that under the "rule of reason" analysis the public interest and that of the parties is served by sustaining the restraint as reasonable.

II.

The NCAA is an unincorporated, non-profit, educational association with some 883 active members, consisting of private and public colleges and universities in the United States. The NCAA was formed in 1906 to regulate and supervise college athletics throughout the United States, and is dedicated to preserving amateurism in athletic activities among its member institutions, with the goal of maintaining those activities on an ethical plane in keeping with the dignity and high purpose of education. Thus, its goals are an integral part of the academic scheme. Of the approximate 883 members, participation in intercollegiate athletics involves about 271 members in Division I, 188 members in Division II and 281 members in Division III. Approximately 143 member institutions do not engage in intercollegiate athletics.

All divisions are subject to NCAA rules governing academic standards in intercollegiate athletics in keeping with the fundamental policy of the NCAA to maintain intercollegiate athletics "as an integral part of the educational program and the athlete as an integral part of the student body." Student-athletes must meet various academic standards in order to become and remain eligible for participation in NCAA sanctioned athletic events. These requirements are designed to insure that those who engage in college athletics are genuine students. One of the recent bylaws requires proof that the student-athlete makes proper progress toward a degree within prescribed terms to remain eligible for competition. Obviously,

the success of the NCAA goal is in large measure dependent upon the good-faith approach to compliance by the member institutions.

In addition to a variety of rules designed to insure adequate academic achievement by student athletes, the NCAA has complex and detailed rules and regulations dealing with recruiting, financial aid or benefits (intended to foster participation in intercollegiate sports by genuine amateurs in the sense that the student-athlete is primarily dedicated to academic goals), and limitations on the coaching staffs. These goals are in large measure accomplished by a strong, vigilant investigative area of the NCAA dedicated to insuring that its member institutions abide the various rules, standards and bylaws designed to maintain the competitive amateur status of intercollegiate football within the academic framework. The complexity of the NCAA bylaws, rules and interpretations evidence the association's effort to maintain and protect academic standards applicable to amateur student athletes.

The NCAA's committee on infractions is responsible for enforcement of the NCAA program. It receives complaints, and in reliance on its investigative staff, determines facts and violations, and fixes penalties. Charles Alan Wright, Chairman of the Infractions Committee, testified that the work of this committee is dedicated to the NCAA policy of maintaining intercollegiate athletics as an integral part of the educational program, with the athlete an integral part of the student body, thus retaining a clear line of demarcation between college athletics and professional sports. The district court gave no credence or recognition to this testimony or similar testimony of other witnesses.

III.

There are relatively few federal court decisions speaking to the issue of amateur athletics' inclusion under the federal

antitrust laws. However, *professional* basketball, golf and hockey have been consistently held to be within the meaning of the Sherman Act. *See* Annot., 18 A.L.R. Fed. 489 (1974) (citing federal court decisions applying federal antitrust laws exclusively to the "business of professional sports.")

In *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), the court was presented with a challenge to the NCAA bylaws limiting the number of assistant football coaches that a member institution could employ. The contention was made that the court was without jurisdiction because there had not been demonstrated sufficient impact on interstate commerce by virtue of the rule to bring the case within § 1 of the Sherman Act. The court held otherwise on this issue but upheld the NCAA bylaws there challenged and pertinently observed:

> A goal of the NCAA, one which is endowed with certain benefits to society, is to "retain a clear line of demarcation between college athletics and professional sports." Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to "catch up", but to "keep up", were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers", such as varsity football and basketball.
>
> [The NCAA regulation in question] was, with other rules adopted at the same time, intended to be an "economy measure". In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful—and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.

Id. at 1153.

I believe that the trial court disregarded the purposes and objectives of the NCAA set forth in *Hennessey, supra.* Instead of recognizing the NCAA goal of fostering balanced amateur competition among the respective division colleges and universities, the trial court viewed intercollegiate football competition not only as a business, but as a "pot of gold" business for those colleges and universities which have consistently recruited top athletes in keeping with their institutional priority of attaining athletic excellence. I believe that Oklahoma, Georgia and other college football powers which desire to be free from the provisions of the NCAA television rules and bylaws, and assert their "right" to contract independently for television dollars, in truth and effect insist on the best of two worlds. While solemnly proclaiming their allegiance to all other NCAA rules and regulations pertaining to intercollegiate football, they insist on invalidating the NCAA television contracts and the provisos relative to distribution of the receipts therefrom, based on the additional monetary rewards that their excellent football programs command in national television. I firmly believe that to the extent that the NCAA's television restraints upon Oklahoma and Georgia and other member institutions with excellent football programs are anticompetitive, these restraints are fully justified under the rule of reason in that they are necessary to maintain intercollegiate football as amateur competition.

IV.

In *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918), the Supreme Court succinctly stated the rule of reason to be: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." It is my view that the district court failed to adequately focus on the procompetitive features of the NCAA television plan-contracts when considered in light of the

entire NCAA design and purpose, the central objective of which is to maintain intercollegiate athletics on an amateur competitive basis.

In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the basic question before the Court was whether the issuance of blanket licenses to copyrighted musical compositions at fees negotiated by American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) constituted a *per se* price fixing in violation of the antitrust laws. The district court dismissed the CBS complaint, concluding that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The court of appeals reversed, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* and also copyright misuse. The Supreme Court reversed the court of appeals and remanded for further proceedings under the "rule of reason". Mr. Justice White delivered the opinion for the Court. Mr. Justice Stevens was the sole dissenter. The majority pertinently observed:

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court had held that certain agreements or practices are so "plainly anticompetitive", *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977), and so often "lack . . . any redeeming virtue", *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on thier individual goods or services are among those concerted activities that the Court has held to be within the *per se* category. But easy labels do not always supply ready answers.
>
> To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organi-

zation that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price". . . . The . . . literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming value" . . . .

Consequently, as we recognized in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . ." See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). *We have never examined a practice like this one before. . . .*

* * *

More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." Id., at 441 n. 16; see *National Society of Professional Engineers v. United States*, 435 U.S. at 688; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S., at 50 n. 16; *Northern Pac. R. Co. v. United States*, 356 U.S. at 4.

Broadcast Music, Inc., supra at 7-10, 19-20. (Footnotes omitted, emphasis supplied).

I recognize that if the rule of reason does not apply to the instant case, the NCAA television contracts may, by virtue of *Arizona v. Maricopa County Medical Society*, ____ U.S. ____, 102 S. Ct. 2466 (1982), constitute *per se* illegal price fixing. This would result because the "maximum" sum is "fixed" by virtue of the contracts which are binding on the NCAA member

schools. *Maricopa* holds that the *per se* rule applies when there exists "a price restraint that tends to provide the same economic rewards to all practitioners [colleges] regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases." *Id.* at 2475. *Per se* violations of § 1 of the Sherman Act are agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal. *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

My research indicates that all of the reported cases wherein the *per se* rule has been applied have involved true competitive *business enterprises* operating in the interstate market where the goal is exclusively that of seeking a profit from the product or service offered to the public. *See Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). Restraints on competition or on the course of trade in merchandising products moving in interstate commerce are not violative of the Sherman Act unless the restraint is shown to affect market prices or otherwise deprive purchasers and consumers of the advantages to which they are entitled from free competition in the market place. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

Maricopa, supra, National Society of Professional Engineers, supra, and *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), involved prohibitive price restraints, even though those restraints were enmeshed with overall programs designed to accommodate needs of people who would benefit therefrom. At the core, however, was the fact that in each case the professionally skilled participants were seeking profits from their services. Thus, their activities constituted business enterprises in a pure competitive sense. I do not view the NCAA

television contracts as falling in that category, because they are not designed to render the greatest profit for a *business purpose.*

V.

If the narrow focus in this case be placed, as I believe the trial court placed it, on the competition for television proceeds from contracts that are exclusively entered into by the NCAA and binding on its member schools, and contracts which may be entered into individually by the established intercollegiate football powers, I have little doubt that the total monetary benefits derived by the football powers would far exceed those received by them via the NCAA contracts. On that measure, then, the NCAA television contracts do constitute an anticompetitive restraint when compared with the potential dollars which the major football powers may command in the so-called "open market".

Nevertheless, I conclude that the NCAA restraints are completely defensible under the rule of reason. The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement. As thus measured, the restraint is not unreasonable in its effect on competition; its procompetitive effect clearly outweighs the anticompetitive effect. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Furthermore, there is no showing that the NCAA restraints laid upon Oklahoma and Georgia have injured the consumer public, *i.e.*, those who view intercollegiate athletic events on television. Thus, the "fall back" position taken by the district court—that antitrust regulation applies when, as here, an association wields exclusive control over television contracts involving the conduct of intercollegiate football—must fail. The district court erroneously focused on the inhibition placed upon Oklahoma and Georgia and those NCAA member institutions similarly situ-

ated who likely could command far greater individual (institution-wise) monetary return for television rights to their football games if permitted to contract independent of the NCAA.

In addition to the amateurism goals promoted by the NCAA, the NCAA's television contract restraints do, on balance, promote competition and enhance viewership at intercollegiate football contests. The NCAA television plan and its television contracts enhance overall viewership when one considers "output"—as entertainment—in the sense urged by the NCAA: those who view the games in the stadiums and those who view the games on television. If viewers are the "consumers", as certainly they must be for antitrust purposes, overall viewership for all games between all participating NCAA members engaging in football, whether Division I, II or III, is increased, rather than reduced by virtue of the NCAA television plan. Critically, live viewership at games is protected by virtue of the plan.

I note that there is a sharp dispute whether NCAA sets or dictates the television "package" with the networks. In *Maricopa, supra,* the Supreme Court applied the *per se* rule to the medical society's practice of setting maximum prices doctor members could claim in full payment for health services provided to policyholders of specified insurance plans. There was no dispute in *Maricopa* that the *maximum* price restraint tends to provide the same economic rewards to all medical practitioners, regardless of their dedication, skill or experience. There is no basis for comparing the medical practitioners in *Maricopa* with the NCAA member institutions. It is significant that the *Maricopa* majority observed that the "rule of reason" exception set forth in *Continental T.V., Inc., v. GTE Sylvania Inc., supra,* is the preferred method of determining whether a particular practice is in violation of the antitrust laws.

VI.

It is my conclusion that the rule of reason militates in favor of the NCAA. Its television contracts allow for near equal per-game payments to member universities. I agree with NCAA's contention that, in the context of the Association's goals and purposes, this is no more "price fixing" than that involved in a law partnership's division of profits. The NCAA provisions on the division of television proceeds simply allocate those revenues among member institutions. This distribution does not affect television output. It does, however, foster competition among its members in keeping with its goal to assure amateurism in intercollegiate athletics and to maintain the primary status of the athlete as a student.

The NCAA distribution is aimed to assure a minimum of competitive balance on the playing fields. The NCAA is, then, a form of joint venture, and its television plan and contracts are an integral, all-important aspect of its purposes and goals. As such, the television contracts do not have the "pernicious effect on competition and lack of any redeeming virtue" stated in *Northern Pacific Railway Co. v. United States, supra* at 5.

The "Fundamental Policy" stated in the NCAA constitution, *i.e.*, that of maintaining intercollegiate athletics as an integral part of the educational program, cannot be considered a profit-oriented goal. I conclude that the district court erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of "every school for itself" approach to television contract bargaining. The statement of "Purposes" for NCAA television contracts for the years 1982-1985, in sum, reveals the district court's error in refusing to recognize that under the rule of reason, the NCAA television contracts under challenge do not violate the federal antitrust laws:

> The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television . . . upon

> football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

Plaintiff's Exhibit "LT".

I would reverse the judgment of the district court.

APPENDIX B

BOARD OF REGENTS OF the UNIVERSITY OF OKLAHOMA, and the University of Georgia Athletic Association,
Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant.

Civ. No. 81-1209-BU.

UNITED STATES DISTRICT COURT,
W. D. Oklahoma.

Sept. 15, 1982.

MEMORANDUM OPINION

BURCIAGA, *District Judge,* Sitting by Designation.

THIS MATTER came on for trial to the Court on the merits on June 7 through 15, 1982. At issue is the legality of the controls exercised by the National Collegiate Athletic Association over the televising of college football games. The plaintiffs, both members of NCAA, allege that these controls violate the Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1980). Having considered the pleadings, evidence, briefs and memoranda submitted by the parties, the Court holds as follows:

(1) The television football controls exercised by NCAA constitute an horizontal agreement among competitors to fix prices and restrict output, in violation of 15 U.S.C. § 1;

(2) The controls constitute a group boycott, in violation of 15 U.S.C. § 1;

(3) The NCAA exercises monopoly power over the market of college football television, in violation of 15 U.S.C. § 2; and

(4) The plaintiffs are entitled to injunctive relief under the Clayton Act, 15 U.S.C. § 26 (1980).

This memorandum opinion shall constitute the Court's findings of fact and conclusions of law.

I. *Findings of Fact*

The parties to this case are the Board of Regents of the University of Oklahoma, the University of Georgia Athletic Association, and the National Collegiate Athletic Association. Plaintiff Board of Regents of the University of Oklahoma [hereinafter, "Oklahoma"] is the governing body of the University of Oklahoma. The Board is responsible for all of the operations of the University, including its intercollegiate athletic program. Oklahoma is a member in good standing of the National Collegiate Athletic Association, the defendant herein.

Plaintiff University of Georgia Athletic Association is a non-profit corporation created under the laws of the State of Georgia. The Association has the responsibility of operating the intercollegiate athletic program of the University of Georgia. The University of Georgia is a member in good standing of the National Collegiate Athletic Association. The executive personnel of the University and the Athletic Association overlap. They shall be collectively referred to herein as "Georgia."

Defendant National Collegiate Athletic Association [hereinafter, "NCAA"] is a private non-profit association organized in 1905. NCAA consists of approximately 900 members. Membership is open to four-year institutions which meet certain academic standards. Allied and Associate membership is open to athletic conferences, associations and other groups interested in intercollegiate athletics.

Oklahoma's intercollegiate football program has, over the years, produced many outstanding and highly-ranked teams. Oklahoma is capable of attracting large national television

audiences for its televised games. Football is the only sport sponsored by Oklahoma which actually generates revenue beyond the costs of fielding a team. The profits generated by the football team support all of the other sixteen men's and women's sports in which Oklahoma participates. In recent years, these programs have become more and more expensive to maintain due to increasing costs and the expansion of athletic programs for women. As a result, Oklahoma seeks to maximize its revenues from football television. Like Oklahoma, Georgia has compiled a record of outstanding success with its intercollegiate football program, and football is the major revenue-producing sport for Georgia. Budgetary pressures have forced cuts in Georgia's athletic program, including the elimination of its intercollegiate wrestling program. Georgia also seeks to maximize the revenues generated from the televising of its football games.

It is useful to present as background the history of NCAA and the football television controls it exercises. NCAA operates pursuant to a Constitution and Bylaws adopted by the membership and subject to amendment by the members. The Constitution, Bylaws, Executive Regulations and Official Interpretations are published in a printed manual and distributed to all members. The general policies of NCAA are established by the membership at annual conventions. When the annual convention is not in session, policy is established and directed by the NCAA Council of 22 members elected by the entire membership at the annual convention. NCAA has a professional staff located at its headquarters in Shawnee Mission, Kansas. Some 80 employees execute NCAA policy under the supervision of Executive Director Walter Byers.

NCAA controls all forms of televising of football games of member institutions during the fall football season. NCAA has exercised such control since the early 1950's.

When television first became a significant part of America's entertainment industry in the late 1940's and early 1950's, there were no controls on college football television. Each college was free to make its own contracts with television networks and stations without limitation. The University of Pennsylvania, for example, was televising all of its home football games in the Philadelphia area during this time. NCAA members expressed concerns to NCAA that unlimited telecasting of college football games might be detrimental in a number of ways. Chief among their concerns was the belief that uncontrolled televising of games would result in a decrease of live attendance at other games being played at the same time and in the same geographic area as the televised games being aired.

The NCAA appointed a Football Television Committee to study and report on these concerns. The Committee retained the services of the National Opinion Research Center [hereinafter, "N.O.R.C."] at the University of Chicago. Beginning in 1952, N.O.R.C. conducted a series of studies of the effects of televised college football on gate attendance of college football games. These studies were conducted through 1957, and tended to support the notion that televised college football resulted in a decrease in live gate attendance for the teams which were not being televised. On the basis of the first of these annual studies, the NCAA instituted the first controls on football television in 1953.

Based on the N.O.R.C. studies, the Football Television Committee developed a program of controls. These controls included provisions that television exposures would be limited to one college football game per week on Saturday afternoons during the fall season, that no team would appear on television more than once per season, that the sponsors would select the games to be televised and that the revenues would be divided among the teams playing the game and the NCAA.

From their inception, these controls were approved by a vote of the entire membership of the NCAA, including a good many members which did not even field a football team. Of some 800 voting members, less than 500 are schools which play football. Of these 500, only 187 are Division I schools. Schools in Division I dominate college football television.

The NCAA Television Committee periodically circulated a questionnaire to NCAA members in order to obtain their suggestions as to what types of controls were desirable. A Plan was then developed by the Committee based on the desires of the membership as expressed in the responses to the questionnaires. The proposed Plan was then submitted to membership for a vote by means of a mail referendum. Once approved, the Plan formed the basis for NCAA's negotiations with the various networks. From 1952 until 1977, NCAA followed essentially the same procedure in contracting with the networks for the right to televise the football games of NCAA members. Beginning in 1977, the membership did not vote on the actual Plan. Instead, a number of "Principles of Negotiation" were distributed to and voted upon by the membership. While these "Principles" provided a general basis from which NCAA proceeded to negotiate with the networks, the evidence shows that substantial departures from these "Principles" have occurred without any form of prior approval by the membership.

Until 1982, the contracts were always made with a single network, although all three of the major networks competed for the rights, and each has held those rights at one time or another. The length of the contracts was always either one or two years until 1977, when NCAA contracted with American Broadcasting Companies [hereinafter, "ABC"] for a four-year term covering the 1978 to 1981 seasons. ABC held the exclusive right to broadcast NCAA football at the network level from the year 1965 to 1981.

The basic concepts of the original controls have survived to the present. The Plan is reviewed and changes in the Plan are made periodically to reflect the concerns of the membership. The most recent significant changes include:

(1) Contracts with two national networks instead of only one beginning in 1982;

(2) A supplementary series of games on cable television beginning in 1982;

(3) Continuing increases in the number of games to be televised each season;

(4) Continuing increases in the number of times any one school can appear during a given season;

(5) Development of regional, as opposed to national, telecasts; and

(6) Increased televising of games where circumstances warrant "exceptions" to the basic plan for a series of network telecasts.

The Plan allows NCAA members a limited opportunity to televise their games other than on the network which had contracted with the NCAA. An example is the so-called "exception telecast," where a member could obtain special permission from the NCAA to telecast a specific game within a limited area on a local station. Such telecasts are allowed only where no "appreciable damage" would result to schools playing games within the same geographic area and at the same time as the proposed telecast. Local "exception telecasts" bring far less to the schools in terms of rights fees than do network telecasts.

NCAA claims that the controls on college football television are entirely consistent with, and are logical extensions of, the organic documents of the Association. However, before 1971, neither the Constitution nor the Bylaws of the Association made any mention of NCAA control of college football television. Prior to that time, the source of the Television

Committee's authority was annual resolutions of the membership. These resolutions were allegedly passed pursuant to a 1952 amendment to the Constitution which added the following provision to the "Purposes" section of the Constitution:

> To legislate through bylaws or by resolution of a Convention upon any subjects of general concern to the members in the administration of intercollegiate athletics.

In 1971, NCAA finally added to its Bylaws a statement of its power to control college football television. Bylaw 11-3-(aa) was adopted at that time and reads, in pertinent part:

> The [Football Television] Committee shall be responsible for the formulation and administration of the Association's football television policy and program, subject to the approval of the membership.

In addition to the controls exercised by the NCAA over football television, NCAA legislates on a number of other aspects of college football. Playing rules, standards of amateurism, regulation of the recruitment of athletes, standards for academic eligibility, and certification of bowl games involving NCAA members have long been a part of the regulatory scheme developed by NCAA to govern college football. NCAA also regulates other college sports. Significantly, however, football is the only sport in which NCAA has taken unto itself the power to regulate the televising of college athletic events. The schools are free to make whatever arrangements they desire for televising regular season games in all sports except football, subject only to some restraints imposed by the various athletic conferences.

The only other NCAA sport which attracts national television coverage for regular season games is basketball. The NCAA does not control the televising of regular season basketball games. Television arrangements are made by the schools themselves, or by the athletic conferences of which they are members. College basketball games are frequently televised on

local stations and cable networks, in addition to national network broadcasts on weekends. While NCAA argues that the free market situation in television basketball bears no relation to that to be expected in a free market for television football, the Court considers the market in television basketball to be persuasive evidence of how a free market in television football would operate. NCAA's attempt to distinguish basketball from football are unavailing.

Partly out of dissatisfaction with different aspects of the NCAA regulations governing college football, a number of major football conferences and independent schools, all members of NCAA, banded together to form the College Football Association [hereinafter, "CFA"]. Both Oklahoma and Georgia are members of CFA. CFA consists of five of the major football-playing conferences—the Big 8, Southeastern, Southwestern, Atlantic Coast and Western Athletic Conferences—and major football-playing independents such as Notre Dame, Penn State, Pittsburgh, and the service academies. The only major football-playing schools which are not CFA members are the members of the Pacific 10 Conference and the Big 10 Conference. Membership in the CFA is restricted to football-playing schools meeting certain standards of size and importance.

The original purpose of the CFA, which is itself a member of NCAA, was to lobby and promote the interests of major football playing schools within the NCAA structure. Beginning in 1979, however, CFA members began to feel that those colleges with major football programs should have a greater voice in the formulation of football television policy than they had in NCAA. CFA members evidently disliked the fact that all NCAA members had an equal vote on issues involving football television, even though a great many members either did not play football or were otherwise not directly affected by the particulars of the football television contracts.

CFA then began investigating the possibility of negotiating an agreement of its own with the networks for the broadcast rights to games involving CFA members. As a result of these efforts, CFA developed an independent television plan and received a contract offer from the National Broadcasting Company [hereinafter, "NBC"]. This occurred in spite of the ongoing negotiations between NCAA and ABC and Columbia Broadcasting System [hereinafter, "CBS"].

NCAA, having learned of the CFA effort to negotiate football television rights on behalf of its members, was not long in responding. The members of CFA had adopted the position that nothing in the NCAA Constitution or Bylaws empowered NCAA to act as the exclusive bargaining agent on behalf of all of its members for the sale of television rights to college football games. In response to the CFA's activities, the NCAA Council adopted the following "Official Interpretation" of Bylaw 11-3-(aa) on April 18, 1981:

> The Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season as defined in O. I. 307. The terms or principles of the control shall be set forth in a television plan or program which periodically shall be prepared by the Football Television Committee, approved by the NCAA Council for submission to the membership by a mail referendum and approved by at least two-thirds of the members voting, a procedure which has been followed by the NCAA membership on a regular basis for approximately 30 years. Any commitment by a member institution with respect to the televising or cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season.

This broad interpretation of the 1971 amendment was the first clear statement of NCAA's position that membership in NCAA was essentially a grant by the member to NCAA of the right to act as the school's agent in negotiating football

television rights fees. It was also NCAA's first specific statement that it controlled "cablecasting" as well as broadcasting. As if in recognition of this fact, the NCAA leadership proposed an amendment to the Bylaws which reads substantially the same as the "Official Interpretation" quoted above. That amendment was adopted by the NCAA convention in January, 1982. Again, all NCAA members, including many which do not play intercollegiate football, were allowed an equal vote in the adoption of the amendment.

In spite of the NCAA Council's interpretation of the 1971 amendment, CFA continued its efforts to negotiate a separate contract. On June 5, 1981, the CFA adopted its own television plan at its annual convention. CFA members rejected the NCAA's purported right to bargain on their behalf and authorized the CFA administration to seek a separate contract for the television rights to football games involving CFA members. On August 8, 1981, CFA did contract with NBC for the rights to televise the football games of CFA members for the 1982 through 1985 football seasons. The CFA—NBC contract contained the same types of provisions which had long been found in the agreements negotiated by the NCAA. However, the NBC contract would have been more lucrative to the members of the CFA than the current agreements between the NCAA and CBS and ABC. The number of appearances allowed each team per season was more liberal than that allowed by the proposed NCAA contract, and the fees to be paid to participating schools would have resulted in a larger television income per school than the current NCAA contract. This contract was ratified by a vote of CFA members at a special meeting in Atlanta on August 21, 1981. Thirty-three members voted in favor of the contract, 20 voted against, and 8 did not vote. This vote did not make the contract binding, however, because CFA members could still elect to opt out of the contract by written notice to that effect before September 10. After that date, NBC had the right to rescind if any of the CFA members chose to opt out of the agreement.

During the time that the CFA was arranging for the contract and its members were deciding whether to join in the agreement with NBC, high officials of the NCAA were making public statements to the effect that CFA members, if they chose to go with NBC, would be in violation of NCAA rules. Further, it was indicated that the NCAA's retaliation would be swiftly forthcoming. Walter Byers, NCAA's Executive Director, and Thomas Hansen, NCAA's Assistant Executive Director, stated that the NCAA administration would seek expedited disciplinary procedures against offending CFA schools. NCAA Preside[illegible]ames Frank and the distinguished Professor Charles Alan W[illegible]ght, Chairman of the NCAA Infractions Committee, made clear that CFA members which chose to be bound by the NBC contract would be in violation of NCAA legislation and that such an infraction was punishable under NCAA's rules. It was also made clear that sanctions would be forthcoming, and would affect not only the football programs of CFA members, but other sports as well.

These events led directly to the initiation of this lawsuit. One reason for the filing of the action was to obtain temporary relief preventing NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to complete its agreement with NBC. Injunctive relief was granted on September 8, 1981, and has continued in effect to the present.

Although the defendant has complied with the Court's order not to interfere, the plaintiffs and CFA were unable to consummate their agreement with NBC. On the final extended deadline for CFA members to opt out of the NBC contract, few CFA members were willing to commit. Consequently, CFA advised NBC that it was unable to provide an adequate inventory of teams, and the arrangement was terminated. NCAA contends that the CFA schools' unwillingness to go with the NBC contract was based on sound business considerations. However, the evidence is clear that the threat of NCAA sanctions, ranging from reprimand to expulsion, being imposed

at some point in the future was a major consideration in the decisions of many CFA members to opt out of the NBC contract. While we cannot know what factors were telling in the decision of any particular college, it is clear that they were unable to exercise fully independent business judgment due to the threat of NCAA sanctions, in spite of the temporary equitable relief granted in this case.

The dispute between the plaintiffs and the defendant continued both in this Court and in the forums provided by the NCAA. NCAA held two conventions of its entire membership in which a number of matters raised in this lawsuit were addressed by the membership. A Special Convention was called in December, 1981, at the request of members of the CFA. This Convention was called to deal with restructuring the NCAA. NCAA member schools are divided into several divisions according to the size of the institution and its intercollegiate athletic program. Division I consists of about 275 colleges and universities with major athletic programs. Divisions II and III include some 500 institutions with less extensive athletic programs. Less than 190 of the 275 Division I schools play football. For purposes of football, Division I has been split into two subdivisions, I-A and I-AA. One of the complaints of CFA members was that Division I-A included many schools whose football programs were much less extensive than those of CFA members, most of which are Division I-A schools. Many CFA members believed that their interests and those of schools with relatively minor football programs were not consistent and that Division I should be restructured to reduce the number of schools in Division I-A.

The concerns of the CFA members were addressed at the Special Convention held in December, 1981, though not necessarily to the satisfaction of all involved. Several CFA members had proposed the creation of a new Division IV composed solely of major football-playing institutions. This proposal was ultimately rejected by the NCAA membership. However,

another proposal was adopted which reduced the number of schools in Division I-A from 105 to about 95. Notably, most CFA members, including the plaintiffs, favored an even more far-reaching restructuring.

At the Annual Convention held in January, the NCAA membership considered a number of proposals directly relating to football television. Several CFA members proposed resolutions which stated that membership in the NCAA could not be conditioned upon the granting to NCAA of the power to place controls on college football television. This proposal was defeated. Instead, the membership adopted an amendment to the Bylaws which purported to establish the propriety of the NCAA controls, ratified the "Official Interpretation" of the NCAA Council to which the Court has previously referred, and ratified the NCAA's actions concerning televising college football for the 1982 through 1985 seasons. In addition, minor changes were made in the manner in which future television plans for college football would be developed.

Having provided a history of NCAA's activities in marketing football television rights, the Court will now turn to the specific aspects of NCAA's controls. The contracts which were made for the 1978 through 1981 and the 1982 through 1985 seasons are the most relevant to the issues raised herein and will therefore be discussed in detail.

One matter must be resolved before examining the controls. The defendant insists that membership in NCAA is voluntary. That being so, says the defendant, the plaintiffs are free to withdraw, thereby ridding themselves of the NCAA controls of which they complain.

It is true that membership is voluntary in the sense that a member institution may withdraw from NCAA at any time. However, it is clear from the evidence that an institution which withdraws or is expelled from the NCAA could no longer operate a fully-rounded intercollegiate athletic program. Non-

member institutions could not compete in the prestigious NCAA championship events in such sports as baseball, basketball, track, swimming, wrestling and gymnastics. They would therefore be unable to recruit quality athletes into their programs. Its football team could not play on television against members of the NCAA. As a practical matter, membership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program.

Moreover, as shall be discussed below, withdrawal or expulsion from NCAA subjects the non-member to a group boycott, and forces the non-member to attempt to compete against a monopolist. The Court must conclude that NCAA membership is not voluntary for these plaintiffs, or for many other colleges and universities for which athletic excellence is an institutional priority.

Many witnesses offered opinions as to the viability of developing a rival organization to NCAA. The estimates of the number of schools necessary to form a rival group ranged from fifteen to one hundred and fifty. The Court concludes that the formation of a rival organization is neither practical, feasible nor desirable. The Court is persuaded that the number of schools needed to form such a group is prohibitively high. NCAA's functions range from developing the rules of play in college athletics to the sponsoring of national collegiate championships in all major sports except football. NCAA has an annual budget of about $20 million. It maintains a large staff, and an expansive system of committees to carry out its functions. It is clear to the Court that the plaintiffs do not have the option of recruiting schools and forming a rival organization to NCAA.

This conclusion is buttressed by the express desire of both plaintiffs to remain members of NCAA. The defendant suggests that it is disingenuous for the plaintiffs to agree to comply with certain NCAA rules, while challenging other

aspects of the NCAA regulatory program in a court of law. NCAA suggests that plaintiffs' motive in bringing this suit is born of spite due to their inability to persuade the NCAA membership that the television controls should be relaxed.

The Court finds little basis to these allegations. The plaintiffs challenge only those aspects of the NCAA regulatory program which they believe violate the antitrust laws and cause them antitrust injury. The plaintiffs make clear that they believe that NCAA has an important role in regulating such matters as the rules of play, standards of amateurism and academic eligibility. For the plaintiffs to support and abide by those aspects of NCAA regulation which do not relate to football television in no way undercuts or shades the merits of their antitrust allegations.

Finally, it is suggested that NCAA and college sports generally should be viewed as somehow different; that maximization of revenue introduces an unseemly air of professionalism into college sport and higher education generally. But it is cavil to suggest that college football, or indeed higher education itself, is not a business. The colleges of the nation are in competition for students, for faculty, for government grants, and for philanthropic support. It is a big business and millions of dollars are involved. The same is true of college football. It is a business, and it must behave in a businesslike manner to insure its future viability. The objectives and the past achievements of our institutions of higher learning have earned them great praise and an exalted position in our social fabric. Nonetheless, it is a business and a business operated by professionals. Like any business, the schools which play intercollegiate football seek to maximize revenue and minimize expense while at the same time maintaining the level of quality which makes their product attractive to the buying public. Our society encourages maximization of revenue so long as the means are legal. The Court, therefore, cannot condemn the plaintiffs' desire to maximize revenue. NCAA's suggestion that

profit maximization is not a worthy goal is truly disingenuous in light of the fact that the express purpose of NCAA's television controls is to maximize the football revenues of member schools.

Under the NCAA's plan for the 1978 through 1981 seasons, ABC held the exclusive right to televise college football on the network level. For this right, ABC paid a so-called "minimum aggregate fee." A part of this fee, some 8% of the total, went directly to the NCAA to help fund certain of its activities. A specified dollar amount was then reserved for the fee to be paid to the teams participating in NCAA Divisions II and III football championships. Under the terms of its contract, ABC was required to televise these championship contests. The teams which participated in games broadcast by ABC received a fee from ABC for the right to televise those particular games. The remainder of the minimum aggregate fee was divided among the schools which appeared on ABC's weekly college football telecast. In order to comply with the contract, the total of the fees which ABC paid to the teams playing televised games had to equal at least the set minimum aggregate fee for that year, minus that part of the fee going to NCAA and the schools playing in the Division II and III championships.

In essence, ABC was paying a certain sum for the right to be the exclusive carrier of NCAA football on the network level. That sum was divided among the teams which appeared on ABC during the course of any given season. The particulars of how that sum was to be divided among the schools were not spelled out in the contract. However, the NCAA Football Television Committee, throughout the term of the contract, made "recommendations" to ABC as to how much should be paid for each regional telecast, and how much should be paid for each national telecast. ABC always implemented these "recommendations," and at no time did ABC pay any more or any less than the amount "recommended" by NCAA.

Once ABC had decided to televise any particular game, it would notify the host team of its decision. Up through the 1980 season, ABC would send a telegram and "require" confirmation of the school's acceptance of the rights fee which had been established. Beginning in 1981, ABC would only "request" confirmation. However, it is clear that negotiation of the rights fee was not anticipated, nor would it have been tolerated.

For example, in 1978 ABC was obligated under the contract to pay a "minimum aggregate fee" of $29 million. By letter dated April 10, 1978 (Pl. Ex. 18), Thomas Hansen, NCAA's Television Program Director, "suggested" the following distribution of the $29 million. Seven hundred fifty thousand was earmarked for the rights fee to the Division I-A playoffs, and $670,000 for the Division II and III playoffs. Another $165,000 was set aside for regular-season telecasts of Division II and III games. Under the contract, ABC was also awarded the right to televise five NCAA championship events in sports other than basketball and football. Two hundred fifty thousand was set aside for that purpose.

This left a total of $27,165,000. NCAA then took eight percent of this amount as its share, or some $2,173,200. This left $24,991,800 to be divided among the Division I teams appearing on ABC during the 1978 season. Under the contract, ABC was to televise 13 games nationally, and 45 on a regional basis. Mr. Hansen then "worked various combinations" until he reached prices for the regional and national telecasts which, when multiplied by the scheduled number of each type of telecast, equalled the balance of the "minimum aggregate fee." Hansen "recommended" that ABC pay $533,600 for each national game, and $401,222 for each regional game. Multiplying $533,600 by 13 yields $6,936,800, and 45 times $401,222 equals $18,054,990. The sum of these figures is $24,991,790.

This method of determining prices was employed throughout the 1978-1981 seasons. The testimony of network officials establishes that for the years 1982-1985, the networks will employ the same method of determining rights fees, and that neither ABC nor CBS will pay any more than the "minimum aggregate fee." (See Table Summary below for key provisions of contracts.)

TABLE SUMMARY OF NCAA—NETWORK CONTRACTS*

1978-1985

Year	Number of Exposures	Minimum Aggregate Fee	Total Commercial Minutes	Price per Exposure	Price per Commercial Minute
1978	23	$29,000,000	506	$1,260,860	$57,312
1979	23	$29,000,000	506	$1,260,860	$57,312
1980	24	$31,000,000	506	$1,291,660	$61,264
1981	24	$31,000,000	506	$1,291,660	$61,264
1982	28	$59,000,000	728	$2,107,140	$81,043
1983	28	$64,000,000	728	$2,285,710	$87,912
1984	28	$68,500,000	728	$2,446,420	$94,093
1985	28	$72,000,000	728	$2,571,420	$98,901

* This Table does not include the contract with TBS for the 1982 and 1983 seasons. The number of exposures, minimum aggregate fee, and total commercial minutes are to be equally divided between ABC and CBS for the 1982-1985 seasons, so that the figure for each network will be one-half of the figure noted in the Table.

Another key feature to the NCAA-ABC contract was a limitation on the number of times any one team could appear on ABC over a certain time period. Under the contract, a school could appear no more than five times over the course of two seasons. A school could televise on stations other than ABC, but only under certain very limited conditions. The "exception telecasts" had to receive prior approval from NCAA. If a school could show that its proposed telecast met all of the prerequisites, NCAA had no discretion as to whether to approve the telecast. A school was allowed to have its game

telecast only if all of the tickets for the game had been sold or if the game was to be played more than 400 miles from the school. If these preliminary criteria were met, the school was then required to show that the broadcast would not be shown within a certain distance of any other college football game being played at the same time as the game to be telecast. (For broadcast on a UHF station, the distance limit was 45 miles; for VHF, 120 miles.) The only exception to this rule was that if the other games being played within the distance limitation were sold out, then the broadcast would be allowed. The number of "exception telecasts" has increased over the years. However, many more games would have been broadcast locally were it not for the cumbersome requirements and procedures entailed in applying for an "exception telecast." All of the restrictions noted herein applied only to schools in Division I. Division II and III schools are allowed unlimited freedom in televising their regular season games.

The NCAA makes much of the fact that under the terms of the contract with ABC, member schools were allowed to negotiate with ABC for the rights fee to be paid for any particular game. This so-called right to negotiate was clearly illusory, however. The practical effect of granting exclusive rights to ABC was to create a monopsony; that is, a situation in which there is only one eligible buyer in a product market. The school could not sell the rights to CBS or NBC, unless it was willing to flaunt the NCAA plan. Such a course would violate NCAA rules and subject the school to the disciplinary proceedings which would certainly follow.

As an example, suppose Oklahoma and Georgia had a game scheduled in the fall of 1981. Both teams were highly regarded by the national media, and with their tradition of excellence, the game would have attracted a great deal of national attention. ABC would have undoubtedly wanted to televise this game. If the schools balked at the figure offered by ABC (that is, the figure "recommended" by the NCAA Foot-

ball Television Committee), ABC had two options. First, ABC could have actually negotiated with the two schools and arrived at a higher figure. Second, and the more likely result, ABC could tell the schools to either take it or leave it. ABC had an almost unlimited choice of other games it could televise in which the teams would accept the fee established by NCAA. The pernicious aspect of the plan was that Oklahoma and Georgia would have no alternatives available to them, save the far less lucrative "exception telecast." ABC would realize that the schools could not sell the rights to another network and, therefore, would be unconcerned about the possibility that the game they ultimately chose to broadcast would appear at the same time another network was broadcasting the Oklahoma-Georgia game.

A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games. There is no dispute as to the fact that, but for the NCAA contract, no broadcaster would be willing to pay the same amount for the Citadel-Appalachian State game as they would pay for the USC-Oklahoma matchup. The fees paid were exactly the amount which had been approved by NCAA. Had Oklahoma and USC attempted to negotiate a higher fee, they would have been able to do so only from a position of weakness. Because

the schools had lost their right to sell the rights to a competitor of ABC, ABC had little if any incentive to actually negotiate the rights fee. If the schools had refused to accept the price established by NCAA and ABC, they faced the very real and unpleasant prospect of not having the game televised at all. This would have cost the schools both a great amount of money as well as the publicity and prestige which accompanies a network broadcast of a game.

Moving to the contracts which are in effect for the 1982 through 1985 football seasons, there is little indication that the situation will be any different. The new contracts do, for the first time, provide for multiple network broadcasts. Both ABC and CBS now have the right to broadcast NCAA football games. Each network has agreed to pay a nimimum aggregate fee of $131,750,000 over the next four years.

In addition to the broadcast network contracts, NCAA entered into a contract with Turner Broadcasting System, Inc. [hereinafter, "TBS"], for the exclusive live cablecasting of NCAA football games. TBS will pay a minimum aggregate fee of $17,696,000 over the next two years.

NCAA argues that because it invited bids from all three of the major broadcast networks, it has met the Sherman Act's requirement of open competition. However, the evidence supports the opposite conclusion. The fact that both ABC and CBS will pay an identical price for identical packages leads the Court to conclude that there was no true negotiation. NCAA substantially dictated the terms under which both networks could televise NCAA football. The networks were offered a take-it-or-leave-it proposition. A truly free market would not have yielded the identical prices and packages which result from the contracts.

The basic features of the previous plans remain intact. While the contracts themselves appear to provide for competition between the two networks for the right to televise any

particular game, the so-called "ground rules" developed by NCAA for the two-network plan eliminate any possibility of competitive bidding between the networks. This much is effectively undisputed. Representatives of the networks and of NCAA have made clear in recent months in their statements to concerned NCAA member schools that competitive bidding for game rights is not contemplated under the new contracts. Instead, the "ground rules" will again produce a monopsony situation in which a single network will have exclusive television rights to any given game.

The "ground rules" will operate in the following way. Before the beginning of each season, the networks will submit to the NCAA Television Committee their preferences for a minimum of three "special dates" per network for the broadcast of football games during that season. If the networks both select the same date, a coin flip will determine which network gets first choice of the "special dates." The network which wins the coin flip would choose a special date, and then the other network would be allowed to select one, with this process continuing until each network has all of the special dates it wishes. The special dates available to the networks are: the first Saturday of the television series for each season; Thanksgiving Day; the Friday and Saturday following Thanksgiving Day; the first Saturday in December; Labor Day; Veterans Day; Monday through Thursday nights, and any Saturday night date approved by the Committee. The networks would then select a date and the specific game or games it wishes to televise, as well as the time of day at which it will show the game. While it is possible for both networks to carry games on the same special date, rules have been developed which will minimize, if not eliminate, the possibility of more than one game being shown at any particular moment.

After the "special dates" have been selected, the networks will then engage in a so-called "equity draft" in which each network will be allowed to select at least two "equity games"

for broadcast by that network. Again there is a provision which minimizes the possibility of two games being broadcast at the same time by the two networks.

After the "equity draft," the networks will then begin alternatively selecting dates over which they will have a "right of control," i.e., the first right to choose any given game. If CBS were to select, say, Saturday, October 30, it would have its pick of all of the games being played that day. If a particularly attractive game is scheduled for that day, CBS would have the first right to choose that game for broadcast. Presumably, the schools staging the game could negotiate for more money than CBS is offering, in hopes that the possibility that competitive bidding between the networks would occur. NCAA contends that this possibility cures the alleged illegality of the prior contracts. However, that view is not supported by the evidence. First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan. In the words of James Spence of ABC Sports, while it is theoretically possible for the networks to engage in a bidding war for the rights to any particular game, "the system is not set up in that way."

The remaining key features of the new contracts are basically the same as in the past. Each network must broadcast a college football game on at least 14 different dates, and a

minimum of 35 games must be shown per year by each network. At least seven of the broadcasts must be national, and a minimum of six must be regional broadcasts. At least one of the networks must broadcast a game on each Saturday of the fall season. No one school can appear any more than six times during any two-year period, and no school can appear nationally more than four times over two years. At least 82 different teams must appear on each network over a two-year period. The number of times any one school may appear during the two-year period must be divided equally between ABC and CBS.

The effect of the NCAA's program of controls is quite obvious. Rather than letting the market operate freely, NCAA has seriously restricted free market forces in the economics of college football television.

Turning first to the plaintiffs' allegations of price-fixing, it can be said with certainty that the prices which have been paid in the past to participating schools for the right to televise any particular game do not even resemble the prices which would have been paid were it not for the NCAA controls. It is quite obvious that were it not for the NCAA controls, no network decisionmaker would even consider offering the same price to the schools involved in last fall's Oklahoma-USC and Citadel-Appalachian State games. Even the defendant's witnesses had to agree that a free market mechanism most certainly would not have resulted in the uniform price paid for each and every game broadcast under past NCAA contracts with the networks. The evidence is clear that NCAA controlled the price to be paid to participating teams, and made it impossible for the teams to negotiate any higher price by restricting dealings to a single network. The evidence is also clear that some teams would have received larger fees were they allowed to negotiate with any and all potential broadcasters. At the same time, the testimony made clear that many of the smaller schools would not have received as much as they did under the NCAA plans if they were forced to compete in a free market.

While the NCAA protests that these features have been eliminated by the new dual-network contracts, it is clear that they have not. As discussed above, a maximum of one game each week may allow the participating schools to engage the networks in true negotiations. However, after the network having the right of first choice on any given date has made its agreement with the teams playing the most attractive game of the week, the other schools are left in the same position as they were under previous contracts. They will be selling in a market where there is only one eligible buyer. They will be unable to use the bargaining leverage which would be available if they could sell the rights to the game to other broadcasters. Further, this monopsony situation is aggravated by the limitations on the number of times a school can appear on a given network over a two-year period. Suppose Georgia appears on ABC three times during one year, two national broadcasts and one regional. Under the current contracts and the "ground rules" accompanying them, during the following year Georgia could only appear, if at all, on CBS. This is because Georgia is limited to six appearances over a two-year period, and these six are to be equally divided between the networks. During the second year, ABC would not be allowed to televise a Georgia game. Georgia would then be forced to appear only on CBS. Georgia would have no bargaining leverage to negotiate a larger-than-average rights fee, since it could not threaten CBS with selling the rights to ABC. Thus, while the new contracts may appear, at first blush, to alleviate these features of past NCAA contracts, in fact they do not. The setting of a minimum aggregate fee, in combination with the "ground rules" restricting competition between the networks and the limitations on each team's appearances, only perpetuate the monopsony situation which NCAA has created.

It was suggested by defense witness Landes that the "minimum aggregate fee" contained in the contracts represent a figure not substantially different from the total of all rights

fees which would be paid to colleges in an unrestricted football television market. This testimony fails to persuade the Court that NCAA's controls are not illegal price-fixing for several reasons. First, Dr. Landes' testimony was pure speculation. There is no data whatsoever before the Court in support of this conclusion, and Dr. Landes' guesswork is unpersuasive. Second, even if Dr. Landes' speculation were proven correct, it does not resolve the essence of the plaintiffs' contention that some football games are worth more to broadcasters than others. The example of the rights fees paid for the 1981 Oklahoma-USC and Citadel-Appalachian State games was conceded by Dr. Landes to be a gross distortion of free-market forces. Third, whether or not the price paid by the networks is reasonable is not a permissible inquiry. Even if Dr. Landes were correct about the reasonableness of the price paid by the networks, that does not mean that the NCAA controls are any less offensive to the Sherman Act. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

The plaintiff also urges that NCAA has acted to place a horizontal limit on production. That is, by making agreements with the networks for exclusive national television rights and placing severe restrictions on local broadcasts of college football, NCAA has agreed to limit production of televised college football. It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to

potential broadcasters is the very essence of NCAA's agreement with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation.

The evidence is also clear that the NCAA plan has many of the characteristics of a group boycott. There are two different ways in which NCAA's cartel-like behavior works as a group boycott. First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters. If an NCAA school were to make an agreement with a broadcaster which did not comport with the NCAA plan, very severe penalties could be inflicted on the offending school under NCAA's rules. Thus, the schools do not stray from NCAA plan, as can be seen from the events which transpired when CFA attempted to negotiate its own contract with NBC. The veiled threats which came from NCAA officials and NCAA's entire course of conduct constituted classic cartel behavior.

This leads directly to the second aspect of the group boycott allegation. If a member school were to defy the NCAA and make its product available to all potential buyers on an equal basis, that school would itself be made subject to a group boycott. This aspect of the group boycott operates in the following way. Unlike many industries, college football requires the cooperation of two producers in order to create their product. That is, two schools must stage a game; one school could not stage a football game by itself, at least not a game

which would attract the kind of attention which NCAA football now attracts. If a member school strayed from the NCAA plan, it would be subject to very severe sanctions from the NCAA. Among the sanctions available would be expulsion from NCAA. Since NCAA members are prohibited from playing televised football games with non-NCAA members, the expelled school would be unable to produce its product. Such a situation would clearly constitute an agreement among NCAA members to boycott the school which strays from the NCAA Football Television Plan.

The NCAA offers several justifications for its policies. The principle argument relied upon by the NCAA is that it is attempting to protect the gate attendance of member institutions. The evidence does not support that contention. First, the Court is not persuaded that college football television has any effect on gate attendance. The N.O.R.C. reports so heavily relied upon by NCAA are fallible in a number of ways. First, their age renders them most suspect. The last of these reports was compiled in 1957, some twenty-five years ago. It strains logic past its breaking point to suggest that because something was true twenty-five years ago, it is still true today, particularly when the subject of discussion is something so fluid as public preference in entertainment. Moreover, the N.O.R.C. studies, while quite professional and thorough, were analyzing a controlled market. Only the first of the N.O.R.C. studies was done in the absence of NCAA controls. The rest were studying a controlled market. No valid conclusion can be reached on the basis of a single year's study, nor on the basis of studies of a controlled market. We simply do not know the effects of uncontrolled televising on gate attendance. Nor is the Court willing to infer deleterious effects from the evidence presented.

The N.O.R.C. studies fail to show that football television was the cause for the steadily declining gate attendance at college football games during the early years of the study. There was no evidence that N.O.R.C. made any attempt to

measure the general impact of the rapidly growing television industry (outside of televised football) on gate attendance. The N.O.R.C. study conceded that college enrollment had declined during the same years that gate attendance did, yet tries to minimize the very obvious relationship between declining enrollment and declining gate attendance. In short, because of the N.O.R.C. study's failure to account for the effect of circumstances which logic says would negatively impact college football attendance, and the inadequate data base upon which it relies, the reliability of the conclusions is suspect. Yet the N.O.R.C. studies are the only empirical evidence supporting NCAA's conclusion that football television harms gate attendance.

The study conducted by Dr. Landes and introduced into evidence is equally unpersuasive. While the study purports to analyze the effect of football television on gate attendance in the areas surrounding Oklahoma and Georgia, Dr. Landes was forced to admit that the study was imperfect since there is no weekend in which college football is not being televised nationally. The statistical significance of the correlation between televised football and gate attendance is marginal, and particularly unpersuasive in that it fails to analyze that effect in terms of the time of day in which the televised games are broadcast as opposed to the time at which the other games are being played. Furthermore, like the N.O.R.C. study, Dr. Landes was studying a controlled market.

However, the greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the "ground rules" eliminate head-to-head programming, a full nine hours of college football will be shown on television during a nine-to-twelve hour period on almost every Saturday of the

football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance.

In the end, the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest. The vast majority of NCAA members suffer none of the restrictions of the NCAA controls, yet that majority can seriously undermine the goals of those schools which are subject to the controls and whose athletic programs are almost completely dependent on revenue from football.

It is also suggested by NCAA that the controls help preserve a competitive balance among the football programs of the various schools. Again, the argument must fail. NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members in matters of football television. Several witnesses testified to a vague belief that the entire program of controls is necessary, but not one witness could give a credible, factually-supported explanation as to why that is so. Even the executive officers of the NCAA could not explain why it is necessary for NCAA to act as the exclusive agent. If the NCAA is seeking to improve the competitive position of smaller schools seeking television revenues, it has done so in a way which inhibits, if not destroys, the effect of free market mechanisms on the price paid to teams appearing on television.

If the NCAA is seeking to improve competition on the football field, it has chosen a much too far-reaching manner of doing so. The NCAA regulations on recruitment, the limitations on the number of scholarships each team may award, and the other standards for preserving amateurism found in NCAA legislation are sufficient to achieve this goal. Rather than relying on the NCAA to improve their competitive position by

restraining competition, the schools can and should compete on their own and improve their position in that way.

The plaintiffs' final allegation is that the NCAA exercises monopoly power over college football television. As is often the situation in cases of this type, the most difficult factual inquiry is the definition of a relevant market. This inquiry is made exceedingly difficult in this case by the fact that we cannot know for sure what the characteristics of this market would be if the market were a free one. The NCAA controls prevent the free market economy from operating as to college football. Because we cannot know what the characteristics of the industry would be in a free market situation, the definition of a relevant market necessarily involves some guesswork.

The Court concludes that the relevant market for testing whether the NCAA exercises monopoly power is live college football television. This conclusion is based on the following facts.

Defining a relevant market involves inquiries into a number of factors, including such characteristics of the industry as the geographic area in which it is available, the time at which it is available, special characteristics of the buyers and the sellers of the product, and special characteristics of the product itself. The only one of these inquiries as to which there is no dispute is that the geographic market is the United States.

The time at which college football is available is Saturday afternoon. Several facts support this conclusion. The vast majority, some 75%, of intercollegiate football games are played on Saturday afternoon. On Saturdays, college football television is free of competition from the programming which logically is the most substitutable; professional football. By the terms of the antitrust exemption which Congress has granted the National Football League, the professional teams cannot televise their games on Saturday during the college football

season. The games to be broadcast are quite clearly a perishable item. Once the game is over and the score of the game is made known to college football fans, viewers are not nearly so likely to watch the game on a delayed telecast basis as they would to watch a live broadcast of the game. Since Saturday afternoons are the time at which most games are played, live broadcasts are almost uniformly on Saturday afternoons. To suggest that college football competes with the complete spectrum of broadcast programming is to ignore the clear fact that Saturday afternoon is the only time at which this perishable product is uniformly available to the broadcaster.

Another factor supporting this conclusion as to the time the product is available is that on Saturday afternoons the type of programming against which the NCAA football telecasts compete is qualitatively different from that available at other times of the week. Network broadcasting on weekdays is characterized by such programming as talk shows, game shows and "soap operas." Weeknight broadcasting is characterized by situation comedies, drama series, and feature movies. The movies which are shown, whether originally made to play in theatres or expressly produced for television, are generally recent works. In contrast, Saturday afternoon programming consists generally of sports programming, cartoons and old movies. It is generally agreed that the quality of Saturday afternoon television, excepting the sports programming, is lower than that offered during other times of the week. So powerful is the appeal of college football on Saturday afternoons that for the past few seasons, the CBS network "went dark" on half of the afternoons on which NCAA football was being shown on ABC. That is, CBS offered no programming at all.

The Court concludes, therefore, that the time at which college football is available is a significant characteristic in defining the relevant market. It is clear from the evidence that college football is uniquely suited to broadcast on Saturday

afternoon. The defendant's expert witness on the broadcast industry testified that college football is different from other programming in that it is uniquely available at the only time of the week in which it is able to compete. College football could not compete on weekdays since the majority of the television audience at that time are women and most network programming is aimed at that audience. Similarly, college football cannot compete with weeknight programming on a consistent basis. It was the opinion of NCAA's expert that college football could not compete even with professional football on Sunday afternoons. Therefore, the conclusion that college football is uniquely suited to broadcast on Saturday afternoons is inescapable.

NCAA urges that even if Saturday afternoons are found to be the time frame by which the relevant market is measured, the Court should consider all Saturdays throughout the calendar year in determining NCAA's market power. However, the Court finds that only the fall football season is relevant. Many products are available only on a seasonal basis, agricultural products being the best example. College football is only played in the fall, and there is no need to look beyond that part of the year.

Turning next to the characteristics of the buyers, there is much disagreement between the parties as to what entities should be considered the buyers in this market. NCAA strenuously argues that the true buyers in the field of network television are the advertisers who buy commercial time during any particular television show. The plaintiffs take an entirely different approach, insisting that the buyers are the networks who purchase the right to televise any particular college football game. The Court believes that the focus of this inquiry must be guided by the nature of the specific antitrust injury alleged by the plaintiffs. The plaintiffs' concerns have little to do with which particular advertisers choose to buy commercial time on college football telecasts. Regardless of which network

or networks ultimately buy the package offered by NCAA, there are going to be advertisers who buy commercial time on those broadcasts. The activity which produces injury to the plaintiffs is NCAA's sale to a particular broadcaster or cablecaster of an exclusive right to televise college football games. That being the source of the injury, the Court's analysis must focus on that transaction. By focusing on that transaction, it becomes clear that college football television is a distinct market in which the stations and networks are the buyers.

Similarly, it is clear that the sellers in this market are the schools whose teams play the games. NCAA insists that the sellers are the networks which sell commercial time to the advertisers. This analysis is flawed for the reasons discussed above. The transaction which is at issue is not the sale of advertising time; it is the sale of the right to broadcast college football games. While in theory each college which plays football should be a seller of the rights to the games which it produces, the theory does not reflect the practice. Under perfect competition, the colleges would all be independent producers competing to sell the broadcast rights to their football games for the highest possible amount. However, NCAA has, by virtue of its controls over football television, literally commandeered this right by acting as the exclusive bargaining agent for the sale of college football television rights. In essence, NCAA has made itself the single seller in the relevant market of college football television, at the expense of the individual sellers.

It is clear that these sellers are unique in the television business. The primary business of these sellers is not television, but education. This fact alone distinguishes these sellers from others. Moreover, there are no other entities which can produce the product. Only the colleges of the nation are able to produce high quality amateur football. High school football does not have the appeal of college football, and is never televised at the network level.

Even if the Court were able to accept the defendant's theory that the buyers in the market are the advertisers and the sellers are the networks, the evidence still persuades the Court that college football is a market unto itself. Advertisers pay far more for commercial time on college football broadcasts than for most other programming—almost three times as much as is paid for Major League Baseball, for instance, and 2½ times as much per viewer as the average program. College football has far and away the largest share of the Saturday afternoon audience of any regular programming, save the Major League Baseball playoffs and World Series. It is true, in terms of rating points (the percentage of television homes actually watching any particular show) that NCAA football does not match most prime time programming. However, that is clearly a function of the fact that fewer homes generally have the television playing on Saturday afternoons. All of this suggests that the demographics of the audience which watches college football is unique. There is simply no other explanation for the amounts of money which advertisers will spend in order to reach an audience that is small when measured against that which is drawn by prime time programming. This conclusion is strengthened by the fact that certain kinds of advertisers dominate the commercial time in college football telecasts.

There are also unique characteristics of the product itself. As stated by James Spence of ABC Sports, NCAA football is a unique product because of its history and tradition, the color and pageantry of the event, and the interest of college alumni in the football success of their alma mater. It is noteworthy that college graduates have buying power which proportionately far exceeds their number. Indeed, ABC was willing to suffer a net loss in televising college football for the benefits it derived from being affiliated with the sport.

The defendant's theory that the relevant market is all broadcast programming is untenable. College football simply does not compete with shows such as "M*A*S*H," "Dallas" or

"Saturday Night Live." Although the demographics of the audience for these shows may be similar to those of the audience for college football, the time at which they are shown is not. "M*A*S*H" is not broadcast on Saturday afternoon, and college football is rarely seen in prime time. Indeed, NCAA restricts prime time broadcasts of college football. "General Hospital" is not shown on Saturday and college football is not shown on weekday afternoons. To accept the defendant's theory of relevant market is to say that every type of programming seen on network television competes with every other type of programming. This is simply not so. Programming patterns vary not only by day of the week, but by the time of day. The audiences for different types of programming have extremely diverse demographic characteristics. The types of advertisers who buy commercial time vary greatly depending on the type of programming. It strains credulity to suggest that broadcast programming does not consist of submarkets, and the Court finds that the evidence does not yield that result.

The evidence is also clear that there is no other product readily substitutable for college football. The most logical substitute, professional football, is not available on Saturday afternoons during the college football season. It is certainly true, as the defendant suggests, that if college football were not available for broadcast, other programming would be substituted. But that simply does not mean that all other television programming is readily substitutable. First, even without NCAA controls, college football would be available to the broadcasters of the nation. The evidence suggesting that college football will not be shown on the network level in the absence of NCAA controls is not credible in the view of the Court. College basketball has done quite well without the interference of NCAA, and there is no reason to believe college football would not.

Second, when college football is available on one network, other networks are hard pressed to find competitive programming other than Major League Baseball. This is evident from the fact that in recent seasons, CBS often "went dark" when ABC was broadcasting college football. Third, both ABC and CBS were willing to pay a great deal more for the right to broadcast college football for the years 1982 through 1985 than ABC paid for the years 1978 through 1981. With some of the difference is to be expected as a product of inflation, the sums to be paid by CBS and ABC are truly extraordinary. ABC and CBS will pay twice as much between them for a *non-exclusive* right in the years 1982 through 1985 than ABC paid for an *exclusive* right in the years 1978 through 1981. This is an extremely clear indication that, in the view of the networks, there is no product which can be readily substituted for college football.

Similarly, the defendant's evidence showing that television advertisers would, if college football were not televised, find other programming on which to advertise is of little significance. It is certainly true that if there were no NCAA football on television, advertisers would find other programming on which to advertise. It is also true that a relatively small percentage of the total television advertising budgets of advertisers who buy time on NCAA football telecasts is devoted to NCAA football. However, these facts do not compel the conclusion that other television programming is readily substitutable for NCAA football. Advertisers on NCAA football telecasts pay a very large amount to reach a relatively small audience. That audience consists largely of male college graduates between the ages of twenty-five and forty-nine years. The average income and buying power of this audience exceed that of the audience for most television programming. This is an audience for which advertisers are willing to pay a relatively high price. Therefore, the price these advertisers pay, when considered in conjunction with the time of the week at which

NCAA football is broadcast, lead the Court to conclude that live college football television is the relevant product market.

NCAA urges that the controls were adopted because of a genuine concern among NCAA members that college football television would reduce gate attendance. Therefore, there was no intent to violate the antitrust laws, and there is still no such intent, according to NCAA. However, the Court is persuaded that NCAA has been well aware of the vulnerability of its football controls to attack under the antitrust laws for some time. In 1976, Executive Director Walter Byers admonished a subordinate to not use the word "set" in describing the Television Committee's activities regarding rights fees for individual games. The word "recommended" was substituted. Byers sought to explain his action as an innocent correction of a subordinate's choice of inaccurate language. However, the Court views this incident as an attempt to conceal NCAA's power to fix the price of college football games.

NCAA is not alone in its awareness of the antitrust implications of its football controls. In December of 1978, ABC urged NCAA to seek an antitrust exemption from Congress. NCAA declined, noting that a recent change in the leadership of the Senate Judiciary Committee made it unlikely that such a proposal would be approved by the Committee.

These incidents and others persuade the Court not only that NCAA was aware of the antitrust implications of the football controls, but also that NCAA has attempted to conceal the extent of its anticompetitive activities. Of course, no specific intent is required to find the defendant liable under the antitrust laws, but this knowledge of the defendant's intent is useful in interpreting the facts of this case and predicting the consequences of the controls. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918).

In summary, the Court concludes that the NCAA controls over college football make NCAA a classic cartel. This cartel has an almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the product of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products.

Like cartels, NCAA seeks to regulate the distribution of revenues to the cartel members. The distribution of football television revenues under the NCAA program in no way resembles the distribution to be expected in a free market. Like all cartels, NCAA, the umbrella under which the cartel has formed, takes for itself a sizable cut of the revenues from the cartelized product.

Finally, the internal wranglings among NCAA members strongly resemble classic cartel infighting. The many less prominent schools seek to expand their football revenues beyond what they would receive in a non-cartelized market. As in all cartels, these artificially high revenues must, at some point, be derived at the expense of more prominent cartel members. The NCAA's attempts to placate the prominent producers, such as Georgia and Oklahoma, have failed. These plaintiffs and others whose superior competitive practices have earned them prominence in the sport of college football wish to no longer suffer the economic injury visited upon them by the less prominent members of the cartel.

Most cartels ultimately fall because of a healthy self-interest among the producers whose competitive ability has earned them prominence in the market. The NCAA football television cartel is no different.

II. *Conclusions of Law*

A. *Jurisdiction and Venue*

The plaintiffs have filed this action pursuant to Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 (1980). Jurisdiction is proper under 28 U.S.C. § 1337 (1980). Venue is proper for purposes of injunctive relief under 15 U.S.C. § 26 (1980). Venue is proper for purposes of declaratory relief under 28 U.S.C. § 1391(b) (1980), as the plaintiffs' claim arose in this district.

B. *Justiciability*

The defendant's first set of arguments go to the justiciability of this case. NCAA urges that the plaintiffs lack standing because they have suffered no antitrust injury as required under Section 16 of the Clayton Act, 15 U.S.C. § 26. Moreover, argues the defendant, because a new set of television contracts are in effect for the 1982 through 1985 seasons, any injury the plaintiffs may suffer is purely speculative, and there is no present case or controversy. Both of these arguments lack merit.

It is clear that the plaintiffs have suffered antitrust injury. There can be no doubt that both of these plaintiffs would have realized increased revenues from football television but for the NCAA controls. The fact that ABC paid the same fee for the plaintiffs' games as it did for the less attractive games leads readily to the inference that if the networks were allowed to choose games for broadcast free from the strictures of the NCAA controls, schools such as the plaintiffs would receive larger fees for their games. This is particularly true if the networks are bidding against one another for the right to

broadcast any particular game. It is also clear that the plaintiffs would realize more revenue from local and regional broadcasts were it not for the NCAA controls. The plaintiffs have suffered injury directly flowing from NCAA's football television controls.

The injury suffered is personal to the plaintiffs. *See United States v. Borden Co.*, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954). This is not a case where the plaintiffs assert that they suffer injury as members of the general public. They are producers in the affected industry. The injury they suffer is direct and substantial, and not indirect or derivative of injury alleged to have been suffered by the public at large.

Even if the plaintiffs had not yet suffered antitrust injury, they have clearly established the prospect of threatened future injury.

> Section 16 of the Clayton Act . . ., which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury . . .; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). The existence of threatened injury is sufficient to meet both the standing requirement and the case or controversy requirement. *Rohnert Park v. Harris*, 601 F.2d 1040 (9th Cir.), *cert. denied*, 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1979); *Paschall v. Kansas City Star*, 605 F.2d 403 (8th Cir. 1979); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C.Cir. 1977); *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Industrial Communications, Inc. v. Pacific Telephone & Telegraph Co.*, 505 F.2d 152 (9th Cir. 1974).

The threat of future injury is clear as to all of the plaintiffs' antitrust claims. Fixed prices and restrictions on output will continue under the new contracts. NCAA has bound its members to a group boycott of broadcasters other than ABC, CBS and TBS. NCAA has threatened its members with a group boycott if they go outside of the new contracts. The Court has no doubt that the threat would have been carried out if the Court had not intervened, and is equally certain that the threats will be carried out in the future if the Court does not act. The NCAA administration and its allies among the membership have literally taken unto themselves the rights of the plaintiffs and others to sell their football games for broadcast on television. It is a power which NCAA has jealously guarded. The administration has clearly demonstrated its taste for retribution, and its willingness and ability to strike a crippling blow to the athletic programs of its members. The proof is as clear as it can be in matters of this sort that if the Court does not intervene, NCAA can and will use every means at its disposal to insure its continued domination of college football television in derogation of the rights of the plaintiffs.

The fact that a new plan is in effect for 1982 through 1985 does nothing to relieve the situation. The Court has found as fact that the anticompetitive aspects of past NCAA controls are carried over into the new contracts and regulations. The Court need not, as suggested by the defendant, sit back and observe the workings of the new contracts to determine whether they are anticompetitive. The plaintiffs have proved by clear evidence not only that the new contracts *may* restrain competition; the plaintiffs have proved that the new contracts *will* restrain competition in the same ways that past NCAA controls have restrained competition. The contracts and accompanying ground rules, in addition to the testimony of NCAA and network executives, clearly establish that there will be no significant changes in the anticompetitive features of the NCAA controls.

> A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past . . . [W]hen one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

NLRB v. Express Publishing Co., 312 U.S. 426, 435-436, 61 S.Ct. 693, 699, 85 L.Ed. 930 (1941).

NCAA has suggested that it will discontinue its role in the fixing of prices paid for individual games. That being so, urges NCAA, it is the networks and not NCAA which will be fixing prices. This argument ignores the fact that but for NCAA's presumptuous taking of the plaintiffs' right to sell their property, the networks would be in no position to fix prices. NCAA is the protagonist in this arrangement. In a suit to enjoin an illegal conspiracy, the plaintiffs need not name as defendants all of the conspirators. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051, *reh'g denied*, 324 U.S. 890, 65 S.Ct. 1018, 89 L.Ed. 1437 (1945); *Perryton Wholesale, Inc. v. Pioneer Distributing Co.*, 353 F.2d 618 (10th Cir.), *cert. denied*, 383 U.S. 945, 86 S.Ct. 1202, 16 L.Ed.2d 208 (1965).

Finally, NCAA advances a novel argument suggesting that because the plaintiffs seek to expand their respective football revenues and share of the football television market, that they have suffered no injury cognizable under the Clayton Act. In support of its argument, NCAA relies on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

In that case, the defendant was Brunswick, a leading manufacturer of automated bowling lane equipment. The purchase of Brunswick equipment was an expensive undertaking, and Brunswick normally offered extended credit terms to buyers. As part of the credit agreement, Brunswick took as

security the right to take over the buyers' bowling centers in the event of default.

Pueblo was in business as a bowling center, and was in competition with one of Brunswick's buyers. The competitor was unable to operate at a profit, and eventually defaulted on its debt to Brunswick. Brunswick then, in accordance with the credit agreement, took over as owner and operator of the buyer's bowling center. Pueblo sued Brunswick, alleging that Brunswick's takeover of the center was an illegal merger.

The measure of damages sought by Pueblo was the amount of increased profits it would have received had Brunswick not taken over the unprofitable bowling center. The Supreme Court rejected this claim as being contrary to the purposes of the antitrust laws. The Court said that

> the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced.... It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

429 U.S. at 488, 97 S.Ct. at 697.

NCAA argues that the plaintiffs here seek only to expand their profits at the expense of other competitors. NCAA contends that the increased revenues to the plaintiffs in this case which would result from a free market are the same as the damages sought by the plaintiffs in *Brunswick*. This argument is without merit.

NCAA apparently equates a damages award based on profits which would result from *reduced* competition with increased profits lawfully gained as a result of the *restoration* of competition. The plaintiffs here do not seek money damages in

lieu of profits they could realize under reduced competition. Rather, they seek the opportunity to increase their profits in a truly competitive situation. The restricted and anticompetitive situation which now exists is beyond their power to change. Appropriately, they have petitioned this Court for an injunction which would restore the free market and allow them to do what the antitrust laws dictate. They ask for the opportunity to compete. This case is not at all like *Brunswick*, and the defendant's argument is without merit.

The Court has considered the defendant's arguments that both standing and a live case or controversy are lacking in this matter. None are well-taken. This case presents a justiciable controversy and is properly before the Court.

C. *The Sherman Act*

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). The Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1(1980). Early on it was recognized that the Act could not be construed literally, since every agreement between producers or buyers in some way restrains trade. Thus, the Supreme Court has ruled that the Sherman Act prohibits only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

The basic policy of the Act is that economic competition be unrestrained. The policy rests on the premise that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preserva-

tion of our democratic political and social institutions." *Northern Pacific Railway Co. v. United States, supra.* The Court is not allowed to determine whether competition is the wisest policy in any given industry, because Congress has determined that free and open competition shall be the rule of commerce in our nation. Arguments describing the ruinous effect of competition in a particular industry are to be addressed to Congress, not the courts. *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 689-90, 98 S.Ct. at 1364.

While the Sherman Act forbids only "unreasonable" restraints of trade, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States, supra,* 356 U.S. at 5, 78 S.Ct. at 518. These types of arrangements have been determined to be unreasonable *per se.* The practices which the courts have thus far determined to be unreasonable *per se* include price fixing, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); group boycotts, *Klors, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); and horizontal agreements among competing sellers to limit the availability of their products. *United States v. Topco Associates,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

With these principles in mind, the Court will now analyze each of the plaintiffs' antitrust theories. As will be seen below, the Court finds that the NCAA controls constitute a *per se* violation of Section 1 of the Sherman Act. Additionally, the Court will go on to analyze the restraints under the rule of reason.

Price-Fixing and Restriction of Output

Price-fixing is a *per se* violation of Section 1 of the Sherman Antitrust Act. *United States v. Socony-Vacuum Oil Co., supra; Arizona v. Maricopa County Medical Society,* ____ U.S. ____, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). If an activity is determined to be price-fixing, the courts may not inquire into the reasonableness of the price which has been established. *Id.*

NCAA first argues that the plaintiffs have failed to show literal price-fixing. This argument is not sustained by the Court's findings of fact. NCAA suggests that ABC is the price-fixer. NCAA says it will no longer "recommend" prices for the games, and injunctive relief is therefore unnecessary. The Court is not persuaded by this argument. The objectionable features of the NCAA package remain in place. The NCAA plan results, in most situations, in a single eligible buyer. The contracts' "minimum aggregate fee" is the minimum, maximum, and *actual* price which will be paid. The networks will continue to pay the same price for every national broadcast, and the same price for every regional broadcast.

It is true that some teams will receive an additional $250,000 if they agree to move a game from its scheduled date. But that does not represent additional income above the "minimum aggregate fee." That extra assessment is part of the contract price. All that means is NCAA has fixed a price for "move" games, as well as for the regular national and regional games.

Nor does NCAA's argument that ABC is the price-fixer have merit. ABC could not do so without the permission of NCAA. It is NCAA, not ABC, which has commandeered the rights of the plaintiffs. Only NCAA is so bold as to claim an exclusive right to sell college football to the networks. NCAA is the only entity with the ability to fix prices and restrict output in the market. NCAA is the defendant, and NCAA has fixed prices. NCAA's attempt to shift the blame cannot be allowed

to succeed. It is the package which NCAA offers and the contract it ultimately executes which offends the Sherman Act. Perhaps it is not a classic method of price-fixing, but "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 223, 60 S.Ct. at 844. In this case, it is clear that NCAA has literally established the price to be paid to colleges whose football games are televised.

However, the fact of literal price-fixing does not necessarily result in a finding of *per se* illegality. In *Broadcast Music, Inc. v. Columbia Broadcasting System,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court recognized that the defendant associations had literally fixed a price for the right to use the musical compositions of composers who were members of the associations. However, the Court pointed out that

> [T]his is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price-fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The . . . literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price-fixing."

Id. at 8-9, 99 S.Ct. at 1556.

Thus, to find that NCAA has literally fixed the price of the rights to broadcast television football does not end the inquiry. While the Court does find that NCAA has literally fixed prices, a close examination of the effect of the NCAA controls is still appropriate. The inquiry "must focus on whether the effect . . . of the practice [is] to threaten the proper operation of our

predominantly free-market economy. . . ." *Id.* at 20, 99 S.Ct. at 1562. The issue is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market." *Id.* at 21, 99 S.Ct. at 1563. On the other hand, if the activity increases efficiency and renders the market more competitive, it is not the type of activity which constitutes *per se* price-fixing. *Id.*

In support of its argument, NCAA relies heavily on the *Broadcast Music* case. NCAA urges that televised college football is in the nature of a "joint venture." NCAA theorizes that member universities must act in cooperation to produce their product, just as the actors, producers, directors and camera operators of a show such as "Dallas" must cooperate to present their product. Thus, like the performing rights societies in *Broadcast Music*, NCAA is a joint venture, according to the defendant.

The Court simply cannot accept this characterization. It is true that the staging of a college football game is a cooperative undertaking, but not in the sense NCAA proposes. The cooperative aspect is simply that it takes two teams to play a game. Those two teams must cooperate, but nothing more is necessary for the staging of the event. NCAA's theory may be seen in its true light using the following example.

Suppose each and every producer of situation comedy shows conspired among themselves to sell only a certain number of comedy series to the networks, each at a fixed price irrespective of their quality. Moreover, in this hypothetical situation, the networks are allowed to buy only a certain number of shows from any one producer, and therefore are limited in the number of shows they can purchase from those producers whose shows are of better quality than other producers. Suppose further that the networks are required to buy shows of inferior quality from smaller members of the con-

spiracy in order to obtain the shows they really want. Certainly the combination here described is in no sense a joint venture. It is a combination in restraint of trade. This is an exact description of the NCAA cartel.

The producers in this market are the various institutions fielding football teams. They have agreed among themselves to sell their games to the television networks. They demand that the networks buy a fixed number of games for broadcast—no more, no less. They insist that the networks buy no more than three programs per year from quality producers such as Georgia, Oklahoma, USC and Notre Dame, thereby forcing the networks to buy programs from producers whose products are not so attractive. They set a price to be paid for the totality of games bought, and in effect set a price for each particular game. This is the situation shown by the evidence, and NCAA's characterization of this enterprise as a joint venture is incredible.

The NCAA television controls are in no meaningful way comparable to the activities of the defendants in *Broadcast Music*. The Court in *Broadcast Music* noted that the line of commerce being restrained existed only because federal law granted composers the right to copyright their compositions. The Supreme Court reasoned that the blanket license arrangement at issue was necessary to effectuate the rights granted by the copyright laws. The Court found it anomalous to suggest that a market arrangement necessary to protect a federally-created right was, at the same time, a *per se* violation of the Sherman Act.

No similar consideration exists in this case. First, there has been no suggestion that college football television is a line of commerce which exists only as a result of federal law. Moreover, the evidence is clear that the NCAA controls are not necessary for the protection of NCAA's members' right to sell their football games for broadcast. Defense expert witness

Klein opined that if NCAA did not sell an exclusive package to the networks, the networks simply would not buy NCAA football games. Stated another way, it is the defendant's position that if NCAA did not act as an exclusive agent, with the power to bind all member institutions to a network contract, NCAA football would not be a viable piece of network programming. The networks pay the extraordinarily high price they pay for NCAA football because of the guarantee of exclusivity. Only NCAA can guarantee this exclusivity. Thus, reasons the defendant, the NCAA controls are the only vehicle by which colleges can market their football games for television.

There can be no doubt that the package offered by NCAA is more attractive to the networks than that which any individual college could offer. However, that fact does not bring this case within the rule of *Broadcast Music*. The arrangement in *Broadcast Music* was found not only to be the most attractive means of marketing copyrighted compositions, but a *necessary* means of marketing that product. The Court found that without the type of licensing arrangement which the defendant had developed, the copyrighted property of member composers was practically valueless.

That is simply not true of the right to broadcast college football. The evidence is clear that many television broadcasters, both national networks and local stations, would buy the right to televise many individual college football games. Indeed, the evidence shows that many more games would be televised in a free market than are televised under NCAA controls. It is likely that fewer schools would appear on network broadcasts. The testimony of network executives makes clear that if it were up to them, they would show fewer games involving fewer teams than they are required to show under the NCAA controls. At the same time, however, the evidence shows that many more games involving many more teams would be shown on local and regional broadcasts. Thus,

unlike the licensing arrangement in *Broadcast Music,* the NCAA controls are not necessary for effective marketing of the product.

Nor can it be said, as was the case in *Broadcast Music,* that the NCAA controls are necessary to protect the property rights of NCAA members from infringement by unauthorized users. The Supreme Court found in *Broadcast Music,* that an umbrella organization was *necessary* to adequately protect copyrighted compositions from infringement. The individual composers simply did not have the wherewithal to monitor the thousands of radio and television broadcasters which sought to use their compositions. The composers had no way of knowing if their copyright was being infringed by some remote individual broadcaster. Therefore, reasoned the Court, it was necessary for the composers to form an umbrella organization and pool their resources in order to effectively guard against unauthorized use of their compositions. In this case, there is no credible evidence suggesting that individual schools are unable to protect their property—football games—from unauthorized broadcasting.

Turning directly to the price-fixing aspect of the NCAA controls, NCAA argues that the establishment of the "minimum aggregate fee" is absolutely necessary to guarantee the colleges a reasonable rights fee from the networks. While this is certainly true, it is true only because NCAA has commandeered the right of its members to market their football games for television broadcast. Having bound its members to selling their rights only to certain networks, and having destroyed their ability to invite competitive bids for the right to broadcast their games, it *is* necessary for NCAA to negotiate a minimum aggregate fee. But this argument assumes the validity of NCAA's literal taking of the rights of these colleges to sell their football games to broadcasters. What NCAA argues, in essence, is that having formed an illegal cartel, restricted output, and organized a group boycott, it was necessary to fix

the price of the product. That is not the teaching of *Broadcast Music*, and this argument has no merit.

This case is distinguishable from *Broadcast Music* in other key respects, as well. An important factor in *Broadcast Music* was that it was impossible for each composer to negotiate agreements with each radio and television broadcaster each time the broadcaster wanted to air one of the composer's copyrighted works. That factor is not present here. The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with ten's of thousands of relatively brief musical works, but with three-hour football games played eleven times each year. Thus, *Broadcast Music* is distinguishable on this ground.

The most important distinction, however, is that in the *Broadcast Music* arrangement there was nothing to prohibit an individual member-composer from selling broadcast rights to any broadcaster on an individual basis. Unlike the members of NCAA, the members of Broadcast Music, Inc., had not agreed among themselves that none of them would sell their rights outside of the blanket license arrangement. In this case, NCAA members have agreed—or have been forced to agree by the will of the majority—not to make their own individual arrangements with any network other than the networks with which NCAA has contracted. This feature is not meaningfully mitigated by the so-called "exception telecasts." For the plaintiffs and others, the exceptions are few and far between, and do not repair the market distortion caused by the NCAA controls.

The Court finds that the NCAA controls are not at all like the arrangement in *Broadcast Music*. The essence of the NCAA controls—indeed their raison d'etre—is to restrict competition. The controls distort the prices paid by the networks for the right to broadcast any given college football game. NCAA forces the networks to broadcast many games which the networks would not broadcast in the absence of the NCAA's controls. One of

the stated purposes of the NCAA controls is to generate more revenue for smaller colleges than they could generate on their own in a free market. Another aspect of the controls is to reduce the market share which superior competitors—such as Oklahoma and Georgia—might win in a free and open market. In short, the NCAA controls are a repeal of the laws of supply and demand. Competition is eliminated, and the pernicious effects of non-competition are present in abundance in the market of college football television.

NCAA suggests that its television controls have pro-competitive features, and therefore are not appropriate for condemnation under the *per se* rule. The Court considers this argument to be foreclosed by the recent decision of the Supreme Court in *Arizona v. Maricopa County Medical Society, supra.* In that case, a group of physicians established a maximum fee schedule for services rendered to policyholders of specified insurance plans. The Court held that the fee schedule constituted price-fixing and was illegal *per se.* In so holding, the Court said:

> The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.

___ U.S. at ___, 102 S.Ct. at 2477.

This language is a clear indication that the *per se* rule applies even where the defendant alleges procompetitive justifications. This argument of NCAA therefore has no merit.

NCAA next argues that this case is inappropriate for disposition under the *per se* rule because NCAA is a voluntary

association and the television controls were developed through a democratic process. This argument fails for several reasons. First, as discussed above, membership in NCAA is not voluntary in any meaningful way. Second, the suggestion that the nature of NCAA as an organization requires a different treatment of its case is plainly contrary to the law. "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing arrangements are concerned, establishes one uniform rule applicable to all industries alike." *United States v. Socony-Vacuum Oil Co., supra,* 310 U.S. at 222, 60 S.Ct. at 843. Third, the fact that the NCAA controls were the product of a majority vote of the membership is of absolutely no significance. The fee schedules in the *Maricopa County* case were established by a vote of the members of the Society, but that did not save it from *per se* condemnation. It is clear that this argument of NCAA is without merit.

NCAA next argues that the television controls are ancillary to the other regulations imposed by NCAA in the areas of recruitment, rules of play, amateurism and grants-in-aid. NCAA urges that the television controls are part and parcel of the overall regulatory scheme, and therefore inappropriate for treatment under the *per se* rule. The so-called "ancillary restraint" doctrine holds that a restraint is valid if:

(1) It is reasonably necessary to accomplish the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary;

(2) It does not unreasonably affect competition in the marketplace; and

(3) It is not imposed by a party or parties with monopoly power. *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 282 (6th Cir. 1898), *aff'd,* 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899); *United States v. Columbia Pictures Corp.,* 189 F.Supp. 153, 185-192 (S.D.N.Y. 1960).

The NCAA controls meet none of these criteria. While NCAA has a valid role to play in the regulation of college athletics, it has gone far beyond the pale of this legitimate purpose in commandeering the rights of its members to sell their games for television broadcast. The primary purposes of NCAA regulations are to preserve a competitive balance in college athletics, insure the amateurism of college athletes, and protect the physical well-being of college athletes. Neither plaintiff challenges the validity of these purposes. However, it does not follow that the television controls are either intended to or effective in furthering these goals.

NCAA produced a parade of witnesses to testify that the television controls are an absolutely essential element of the overall regulatory program. Among these witnesses were NCAA President James Frank, Executive Director Walter Byers, Television Committee Chairman Wiles Hallock, and an impressive array of university officials and athletic program administrators from several of America's finest colleges and universities. But none of them—not one single witness—was able to articulate any credible reason as to *why* it is necessary for NCAA to act as an exclusive agent with the authority to bind all NCAA members to an exclusive contract. That these gentlemen believed that to be the case is beyond doubt. But the accuracy in fact of the proposition they put forward is specious.

The far-reaching NCAA regulations governing college football, other than those relating to television, are clearly sufficient to accomplish the legitimate objectives of NCAA. NCAA limits the number of games the teams play each season. It limits the number of coaches and players a college football team can have. NCAA establishes all of the rules of play for college football. NCAA intensively regulates recruitment of high school athletes by the colleges to insure that these athletes are not offered inducements which would compromise their amateur standing. NCAA sets standards of academic achievement which student-athletes must meet to be eligible for

intercollegiate competition. NCAA regulates the number of athletic scholarships a school may award in any given sport, including football.

This list is only a small part of the vast NCAA regulatory scheme. The Court is persuaded that these controls are sufficient to accomplish the legitimate non-commercial purposes of NCAA. It follows that the controls exercised by NCAA over college football television are not necessary to preserve competitive balance on the playing field.

NCAA seeks to escape this result, arguing that the increased revenues which schools such as Georgia and Oklahoma would receive in an open market would give them an overwhelming advantage over other schools. The large revenues could be channeled into the recruitment and training of better and better football teams. Schools which did not generate such revenues could never, in NCAA's view, hope to compete with the "power elite" of fifteen or twenty schools which would result from a free market situation.

The Court cannot accept this view for several reasons. First, the plaintiffs made clear at trial that increased football television revenues are not going to be funneled back into their football programs. Drs. William Banowsky and Fred Davison, Presidents of Oklahoma and Georgia, respectively, made clear that the antitrust activities of NCAA do not destroy the profitability of their football programs. The plaintiffs will continue to play football whatever the ultimate outcome of this litigation, and they will do so at a profit. But the other sports currently offered at these schools *will* suffer. The anticipated revenues from free market football television will not assist the football programs so much as it will the golf, basketball, wrestling, swimming and baseball programs. The Court also notes with approval the efforts of the plaintiffs to improve their athletic programs for women. This commendable undertaking is jeopardized by the plaintiffs' inability to maximize revenues

from college football television. The Court finds that these fears of NCAA are overstated for this reason.

Second, if NCAA's purpose is to avoid the creation of a "power elite," it has failed. The documentary evidence reveals that there already exists this "power elite" which NCAA so fears. Along with the plaintiffs, schools such as Notre Dame, University of Alabama, University of Nebraska, Pennsylvania State University, Ohio State University, University of Michigan, USC, and the University of Pittsburgh form a "power elite." They are the teams that are televised most frequently. Notably, the televised games of these schools produce far better ratings than games between lesser-known schools.

Nor is it impossible for schools with lesser-known football programs to break into this elite group. The documentary evidence shows that in recent years, schools such as Clemson University, Pittsburgh and Georgia have achieved dramatic increases in television exposure and, of course, television revenues.

NCAA submits that if it is not allowed to control football, the "power elite" will systematically rout their opposition on the field, thereby alienating viewers, and ultimately destroying the marketability of college football. This argument borders on frivolous. What NCAA argues, in essence, is that competition will destroy the market. This argument is hardly novel. It has been consistently rejected by the courts, and it will be rejected now. As the Supreme Court said in *Socony-Vacuum*,

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination.

310 U.S. at 221-222, 60 S.Ct. at 843.

The basic policy of the Sherman Act is free competition. If NCAA is correct about the "power elite," and if viewers lose interest in one-sided games, the free market should and will resolve the problem. The networks will respond to poor ratings by showing more competitive games. That is how the market should operate, and that is what the Sherman Act demands.

Finally, the Court notes that if a "power elite" emerges, and if it abuses its competitive edge through illegal means, relief will be available under the antitrust laws. If today's victim of a price-fixing conspiracy is tomorrow's price-fixer, the Sherman Act can be employed against it. Free market competition must be restored to this industry, and the Sherman Act guarantees that it will be maintained.

Finally, NCAA insists that its activities are not price-fixing because it does not have market power. Of course, the Court has determined that NCAA does have market power. But even if that were not so, NCAA's argument is without merit. "Any combination which tampers with price structures is engaged in unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." *United States v. Socony-Vacuum Oil Co., supra,* at 221, 60 S.Ct. at 843. Simply put, "price fixing is contrary to the policy of competition," and "[i]t makes no difference ... whether the participants possess market control ...." *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 309-310, 76 S.Ct. 937, 939-940, 100 L.Ed. 1209 (1956).

The Court thus concludes that the NCAA television controls are not mere "ancillary" restraints. They are much more far-reaching than necessary to accomplish the legitimate pur-

poses of NCAA. They not only inhibit competition, they destroy it. NCAA has market power, and has employed that power to both fix prices and restrict output. The controls are naked restraints, whose only purpose is to restrict free market forces. The controls result in a marketplace vastly different from that to be expected in the free market. The television controls of NCAA are *per se* violations of § 1 of the Sherman Act.

Group Boycott

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been in the forbidden [*per se*] category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." . . . For . . . "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Klor's Inc. v. Broadway-Hale Stores, Inc., supra, 359 U.S. at 212, 79 S.Ct. at 709 (citations omitted).

The plaintiffs assert that the NCAA controls constitute a group boycott. The Court has described in its findings of fact the way this group boycott operates. The Court now concludes that, as a matter of law, the NCAA controls constitute a group boycott and are illegal *per se* under § 1 of the Sherman Act.

Group boycotts can operate in a number of different ways. For instance, a group of producers can conspire to boycott other producers. *See Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945). The conspirators in *Associated Press* agreed that none of them would sell their product, news, to competitors of the conspirators. Any violation of the agreement could result in sanctions against the violator ranging from fines to expulsion. By agreeing not to sell to each

other's competitors, the conspirators crippled their competitors' ability to effectively compete.

The same situation exists in this case. As in *Associated Press*, group members who violate NCAA rules are subject to expulsion. NCAA members have agreed that none of them will allow their football teams to appear on television against the football team of a non-member. The non-member is then not only crippled, but completely unable to produce its product, football games, for sale to broadcasters. Therefore, the non-member of NCAA is unable to compete with NCAA members in selling football games to broadcasters.

Another form of group boycott is found in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961). In that case, the American Gas Association had established a testing procedure for determining the safety and efficiency of gas burners. The Association consisted of utility companies which distributed gas, pipeline companies which transported gas, and manufacturers of gas burners. Unless a particular gas burner received the Association's seal of approval, the gas distributors would not supply gas for use in that burner.

The plaintiff was a manufacturer of gas burners seeking to enter the market. It submitted its burner to the Association for approval, but did not receive the seal of approval. The gas distributors would not, therefore, supply gas for such burners, and the product was therefore worthless to the buying public. The plaintiff alleged that the Association's standards were not designed to test efficiency and safety, but rather to insulate from competition those members of the Association who were manufacturers of burners. The Supreme Court held that these allegations were sufficient to state a claim of group boycott under § 1 of the Sherman Act.

The NCAA controls operate in a similar fashion. Non-members of NCAA, as discussed above, cannot appear on

television against NCAA members. Thus, as in *Radiant Burners*, group members can withhold from non-members an input without which the non-member's product is worthless. Just as a gas burner is worthless without gas, a football team cannot produce its product without an opponent. The NCAA controls in effect deprive the non-member of the means of producing its final product, a football game. It is clear that neither plaintiff could market its product if not allowed to televise their games against NCAA members. NCAA membership is as critical to the plaintiffs' business success as the American Gas Association's seal of approval to the plaintiff in *Radiant Burners*.

Another form of restraint which the Supreme Court has determined to be a group boycott is found in *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941). In that case, a group of manufacturers agreed among themselves to refuse to sell to retailers who dealt in inexpensive copies of the original designs of the group members. The boycott was intended to drive the so-called "fashion pirates," horizontal competitors of the conspirators, out of business. The technique employed was to threaten retailers with a boycott if those retailers bought from the blacklisted manufacturers. In other words, a group of sellers agreed to boycott any buyer who bought from certain seller-competitors of the conspirators.

In this case, NCAA members have agreed not to sell their product—football games—to certain buyers. Every broadcast and cable network in the country, other than ABC, CBS and TBS, are being boycotted. Further, those local broadcasters which are not affiliated with ABC or CBS are allowed to buy football games only in very limited circumstances.

The situation here is somewhat different from that in *Fashion Guild*. Unlike the "fashion pirates" in *Fashion Guild*, the buyers being subjected to the boycott have done nothing to

provoke such a boycott. Another distinguishing factor is that it is not the horizontal competitors of the boycotted buyers which have organized and enforced the boycott. Instead, the sellers themselves have increased, through concerted action, the value of their collective product by promising ABC, CBS and TBS that they will boycott all other networks.

However, while there are factual distinctions between this case and *Fashion Guild,* the effect of the boycotts in the two cases are the same. The boycott narrows the outlets to which producers of college football can sell by prohibiting dealings with NBC. It subjects all buyers and sellers of college football television rights to an organized boycott if they refuse to comply with the controls. The NCAA boycott "has both as its necessary tendency and as its purpose and effect the direct suppression of competition." *Fashion Guild, supra,* at 465, 61 S.Ct. at 706. Indeed, as was the case in *Fashion Guild,* "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations. . . ." *Id.* The NCAA "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211, 242, 20 S.Ct. 96, 107, 44 L.Ed. 136 (1899).

The Court has no difficulty in concluding that NCAA has organized a group boycott. Indeed, it is the ultimate group boycott, far more powerful and effective than those in the cases discussed above. There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS. Broadcasters like NBC, the Hughes Sports Network, MetroMedia and TVS cannot buy NCAA football for network broadcast. Cablecasters such as the ESPN and USA networks cannot buy NCAA football for cablecast. There are no exceptions. The producers of college football have horizontally agreed that they will refuse to deal with these buyers. The existence of a group boycott could not be more clear.

The existence of a group boycott against horizontal competitors of NCAA members is also clear. The non-member of NCAA which wishes to sell its football games for television is subjected to a boycott. NCAA members are in a more powerful position than any of the combinations described above. NCAA members dominate the college football television market. The amount of college football televised outside of the NCAA contracts with the networks is minimal. NCAA members will not play televised games against non-members. They have the power to withhold from their competitors a key ingredient of the product. There is no doubt that NCAA has organized a group boycott, enforced the rules of that boycott, and employed threats and coercion to maintain the boycott.

Thus, the existence of a group boycott is clear from the evidence. However, NCAA asserts that the plaintiffs do not have standing to litigate the issue of whether NCAA members have organized a boycott against broadcasters and cablecasters other than ABC, CBS, and TBS. Further, NCAA argues that, as to the NCAA boycott against non-member horizontal competitors, there is no case or controversy since both Oklahoma and Georgia are members of NCAA and are not subjected to the boycott. Both the case or controversy and the standing requirements are met in this case. The plaintiffs are themselves injured by the boycott against the competitors of ABC, CBS and TBS. If the defendant had not commandeered the plaintiffs' right to sell to whomever they pleased, the plaintiffs would have received greater rights fees. Because of the boycott, they are unable to sell to the highest bidder, and therefore realize less income, than they would if the boycott did not exist. This is certainly the sort of antitrust injury which the Sherman Act was meant to prevent, and for which the Clayton Act provides remedies. The plaintiffs have proved the existence of a group boycott, and the Court holds that this boycott is *per se* violation of Section 1 of the Sherman Act.

The Rule of Reason

Although the Court had concluded that the NCAA controls constitute a *per se* violation of the Sherman Act, it seems appropriate, nonetheless, to examine the restraint under the Rule of Reason. In large part, the *per se* rule was developed for the purpose of avoiding detailed inquiry into an industry where such an inquiry is unlikely to reveal procompetitive justifications for the challenged restraint. In this case, the Court has already undertaken a detailed inquiry into this industry, and the interest of litigation efficiency is not offended by conducting a Rule of Reason analysis. Moreover, the unique nature of college football, in combination with the fact that an extensive inquiry into the industry has already been conducted, makes it advisable that the restraints be analyzed under the Rule of Reason. *Cf., Mackey v. National Football League,* 543 F.2d 606 (8th Cir. 1976) *cert. denied,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

In conducting a Rule of Reason analysis, it is useful to first note what is not to be considered. "Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 688, 98 S.Ct. at 1363.

Thus, while the fact-finder is to consider all of the circumstances in determining the reasonableness of the restraint, *Arizona v. Maricopa County Medical Society, supra,* ____ U.S. at ____, 102 S.Ct. at 2471; *Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1972), certain inquiries are forbidden. The Court may not, for instance, inquire into the reasonableness of the prices set by a price-fixing combination. *United States v. Addyston Pipe & Steel Co., supra,* at 282-283. Nor may the Court entertain the

argument that because of an industry's special characteristics, monopolistic arrangements are better for the industry than competition. *United States v. Trans-Missouri Freight Ass'n,* 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 689, 98 S.Ct. at 1364. Rather, the inquiry mandated by the Rule of Reason is whether the challenged restraint "is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade v. United States, supra.* If the restraint is such as may suppress or destroy competition, it is an unreasonable restraint.

A finding of unreasonableness may be based on either the nature or character of the contracts, or on surrounding circumstances giving rise to the inference that they were intended to restrain trade or enhance prices. *National Society of Professional Engineers v. United States, supra,* 435 U.S. at 690, 98 S.Ct. at 1364; *Standard Oil Co. v. United States, supra,* 221 U.S. at 58, 31 S.Ct. at 515. Under either branch of the test, the inquiry is confined to a consideration of the impact on competitive conditions.

In making this determination,

> [T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. United States, supra. See also Arizona v. Maricopa County Medical Society, supra, ____ U.S. at ____ n. 13, 102 S.Ct. at 2472 n. 13; *United States v. Topco Associates, supra.*

Applying the Rule of Reason to this case, the Court concludes that the NCAA controls are unreasonable restraints on competition and therefore illegal. The restraints are illegal under both branches of the *Standard Oil* test. The controls are unreasonable by their very nature and character, and the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices. *Standard Oil Co. v. United States, supra; National Society of Professional Engineers v. United States, supra,* 435 U.S. at 690, 98 S.Ct. at 1364. The Court will first examine the history and circumstances surrounding the controls.

The history of the NCAA television controls has been recounted in the Court's findings of fact. The NCAA restraints were adopted in 1952. Many NCAA members were concerned that the televising of college football would hurt the gate attendance at their games. The purpose of the controls was to avoid a decrease in live gate attendance. NCAA was made the vehicle for the controls, because most of the nation's football-playing colleges were members of NCAA, and NCAA had traditionally regulated other aspects of college football. It therefore seemed appropriate that NCAA be the vehicle for regulating college football television.

Whether the NCAA controls have had the effect of protecting live gate attendance is a matter of great dispute between the parties. The Court has concluded that there is no persuasive evidence that the NCAA controls actually protected gate attendance, particularly in recent years.

Over the years the purpose of the controls has changed. It has become clear that the major purpose of the controls is no longer to protect gate attendance, although NCAA contends

that it is. Instead, the main purpose of the controls is to maximize the football television revenues of member schools. The evidence is clear that the less-prominent schools receive far more in rights fess than they could expect in a market free of the controls. It is also clear that a number of schools could expect to receive larger rights fees in a free market than they have under the NCAA-controlled market. The NCAA, in a very real sense, takes revenue from the most prominent football schools, keeps a large share for itself, and distributes the rest to many of the less prominent members. The controls are no longer designed to protect gate attendance so much as to enhance the television revenues of less prominent members, and to provide NCAA with income.

An analysis of the controls themselves makes this conclusion clear. Under the controls, a full nine hours of college football will be televised on several Saturdays of the coming football seasons. Quite obviously, if televised football injures gate attendance, the NCAA plan does little to avoid this injury.

Even more telling are the provisions relating to the number of games to be televised. NCAA fixes the number of games to be televised by the networks. The number of games to be shown on the networks is higher than the networks would show in an unrestricted market. NCAA restricts the number of times any one team can appear on the networks, and fixes the number of different teams which must appear over the period of the contract. The networks, in the absence of NCAA's controls, would show more of some teams than they are allowed under the controls, and would show fewer different teams than required under the NCAA controls.

NCAA has, in past years, effectively fixed the price the networks pay to the schools for the right to any given game. Under the new contracts, the same type of price-fixing will occur. In most instances, the price is higher than the networks would pay in the absence of the controls. In other insfances, the

price is probably lower than the networks would be willing to pay in an unrestricted market.

It is obvious that the purpose of the controls is to enhance the television revenues of less prominent football-playing schools. There could be no other reason for the fixing of a uniform price. While it is possible that the appearance limitations on individual teams may have been originally intended to protect gate attendance, the more likely and direct result is that less prominent football-playing schools will appear on network television when they otherwise would not. The Court is satisfied that the goal of maximizing revenues is far more important to NCAA than that of protecting gate attendance.

NCAA does not really deny that its plan is intended to give smaller schools more television revenue than they would otherwise receive. Instead, NCAA contends that this sharing of the wealth is necessary to preserve a competitive balance on the playing field. The Court has already rejected this argument as being contrary to both the facts and the law. It is clear that the NCAA restraints are much more far-reaching than necessary to achieve competitive balance. Moreover, the Court concludes that whatever marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy.

The cases cited by NCAA are inapposite. Several courts have analyzed the non-commercial activities of NCAA and concluded that they were reasonable methods of preserving and regulating competition in intercollegiate football. *See Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499 (Okla. 1977); *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Jones v. NCAA*, 392 F.Supp. 295 (D. Mass. 1975). The Court would agree with these other courts that the NCAA regulations at issue in those cases were valid under the Rule of Reason. However, none of these cases dealt with the com-

mercial activities of NCAA. These activities are far different from regulations governing the size of coaching staffs or rules on academic eligibility. There is only a tenuous relationship between such non-commercial regulations and the marketplace. Moreover, the non-commercial regulations relate more directly and effectively to the preservation of competitive balance. In this case, the commercial activities of NCAA have a direct and substantial anti-competitive effect on the marketplace, and contribute only indirectly, if at all, to the legitimate non-commercial goals of NCAA. For these reasons, the Court is neither bound nor persuaded by the cases cited by NCAA.

The fact that NCAA exercised its power pursuant to legislation passed by the membership is of no moment. It is true that NCAA first engaged in this commercial regulation only at the request of its members. However, since that time, the administration of NCAA has steadily increased the extent of its commercial regulation far beyond that original authorization. It is most notable that when the plaintiffs first joined NCAA, there was nothing in NCAA's organic documents even suggesting that NCAA had the power to regulate the commercial activities of the members' athletic programs.

By 1971, NCAA had adopted far-reaching and very restrictive regulations governing football television, even though there was still no reference to such authority in the Constitution or Bylaws. In that year, NCAA finally added Bylaw 11-3-(aa). Notably, that Bylaw says only that the Television Committee "shall be responsible for the formulation and administration of the Association's football television policy and program. . . ." Nothing in this Bylaw could be read as granting NCAA the pervasive authority it now exercises.

In the mid-1970's, the NCAA administration proposed to the membership an amendment which would have, for the first time, made clear the extent of the authority NCAA believed itself to have. This amendment seems to have been in part a

product of afterthought, and in part a product of the realization that NCAA was acting far beyond the authority recognized in the Bylaws. As it happened, the amendment was never put to a vote because of an overcrowded agenda of more pressing business. Interestingly, such a proposal was not again presented to the membership until after the plaintiffs challenged the validity of the controls in this Court.

NCAA essentially commandeered the rights of its members to freely market their product. It was only after the members of CFA had made clear that they believed NCAA had overstepped its authority that NCAA made its first official statement as to its power over college football television. The "Official Interpretation" handed down by the NCAA Council on April 18, 1981, was the first clear statement by NCAA of its belief in its right to act as the exclusive vehicle for marketing the football games of its members. Having slowly but steadily increased its role in the commercial affairs of its members, NCAA made a belated attempt to legitimize its seizure of power and justify its domination of college football television.

Even since the filing of this lawsuit, the NCAA administration and its allies in the membership have acted to consolidate NCAA's power. At the December, 1981 Special Convention and the January, 1982 Annual Convention, NCAA adopted resolutions and amendments to its Bylaws belatedly "authorizing" NCAA to commandeer the rights of its members to market their product. NCAA would have the Court view these events as democracy in action, but there is nothing noble about what these Conventions achieved.

The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals were adopted. Instead, the membership uniformly adopted the proposals of the NCAA administration which "legitimized" NCAA's exercises of power.

The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of NCAA, 500 or so are in Divisions II and III and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I-A at the time of the January Convention. Division I-A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television.

In light of these numbers, it is hardly surprising that the NCAA administration was able to garner an overwhelming majority of the members to support its proposals. This is particularly true when one considers that the NCAA contracts provide many millions of dollars directly to NCAA, some 20% of NCAA's annual budget. Without this income, NCAA would be forced to either cut back on its programs, increase membership dues, or look for other sources of income. It is easy to see why the vast majority of NCAA members find it in their best interest to have NCAA control college football television.

The history and circumstances of the NCAA controls compel the inference that their purpose is to enhance prices. They achieve this purpose by restricting output and fixing prices. They do not merely regulate and promote competition. Instead, they suppress competition to the point of destruction. The controls are therefore unreasonable restraints of trade and illegal under the Sherman Act.

Turning to the other branch of the *Standard Oil* test —whether the controls are, by their very nature and character, unreasonable—the Court must again conclude that the controls are illegal. The controls clearly are of such a nature that they offend on their face the policy of open competition dictated by the Sherman Act.

Many untoward characteristics inhere in the NCAA controls. The controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they may not. The schools are not allowed to test the marketplace; they are locked into dealing with only certain networks. The schools are not even free to deal with local broadcasters except in the very limited situations where "exception telecasts" are allowed.

In a competitive market, each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose. Most often the seller would sell to the higher bidder, although that need not always be the case. Quite obviously, the NCAA controls do serious violence to the competitive forces which should determine which telecaster ultimately wins the right to televise any particular game.

Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.

In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates

for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market.

Turning next to the availability of the product, the NCAA controls limit free market forces in a number of ways. First, the controls force the networks to show more games involving the less prominent football schools than they would if it were left up to them. The controls restrict the number of games shown by local telecasters far below that which would be shown in a free market.

The controls also prevent the broadcast networks from showing more than six games over two years involving any particular team. In a free market, some teams would likely be shown more than six times over two years. The controls also require that 82 different teams be shown on the broadcast networks over a two-year period. The testimony of network executives makes clear that many fewer teams would be seen on the networks in the absence of the NCAA controls.

Thus, the evidence is clear that the NCAA controls cause the number of games shown to the viewing public to be very different from that which would be shown in a free market. Fewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls. It is clear therefore that NCAA has drastically affected the number of games seen on television. To put it a different way, NCAA has restricted output.

It is clear that the NCAA controls have a devastating effect on competition. By their very nature, they inevitably result in

price manipulation, restriction of output, and severe limitations on the options of both buyers and sellers. It cannot be said that their effect on the market is *de minimus*. NCAA dominates the entire market of college football television. The NCAA controls affect every single college football game shown on television. They affect nearly every aspect of the market.

Perhaps its most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.

Nor are there any redeeming pro-competitive benefits. The controls have not been shown to protect gate attendance, nor do they preserve a competitive balance among the schools. The only benefits from the plan go to NCAA itself, and the less prominent schools whose games would not appear on network television in the absence of the controls. Consumer demand and the free market are sacrificed to the interests of the NCAA administration and its allies among the membership.

The Court therefore concludes that the NCAA controls are unreasonable naked restraints on competition, both by their nature and by virtue of surrounding circumstances which compel the inference that they were intended to restrain competition. It is clear that NCAA is in violation of Section 1 of the Sherman Act.

Monopolization

The plaintiffs have alleged that NCAA has monopolized the market of college football television. The Court has concluded that college football television is the relevant product market for measuring NCAA's power to raise prices and restrict competition.

The issue of relevant market was hotly contested at trial. NCAA relied on the testimony of Dr. William Landes. Dr. Landes conducted a number of analyses which led him to conclude that college football television is not a spearate market. The Court has rejected Dr. Landes' conclusion separate the following reasons.

Dr. Landes notes in his report to the Court that in a competitive industry, the price of a product is determined by the interplay of consumer demand and the marginal cost of producing each extra unit of the product. Consumer demand rises and falls depending upon the price of a product. As the price of a product rises, the demand for that product falls, because consumers will substitute other products for the one for which the price has increased. The demand curve reflects the value to the consumer of the last unit demanded. Ordinarily, individual producers maximize their profit when the cost of producing each extra unit is equal to the value to the consumer of the last unit demanded.

But college football is an exception to this general rule. For both the individual schools and NCAA, the marginal cost of producing a football game for television is practically nil. This is due to the fact that a football game is going to be played whether or not the game is going to be televised. The costs of staging the game are going to be incurred even if the game is not televised. That being so, it costs the school nothing to produce a game for television, since the costs are going to be incurred in any event. Therefore, the assumption that profit maximization occurs when marginal cost equals demand is not valid in the case of college football television.

In the ordinary industry, the monopolist determines maximum profit by computing marginal revenue. Marginal revenue is the profit the monopolist can make by selling one additional unit of product. It is computed by taking the price of the last unit sold and subtracting the revenue that is lost on the sale of

earlier units because the price of those units must also be reduced, assuming that the price is to be uniform. The monopolist makes its maximum profit at the point where marginal revenue and marginal cost are equal. The intersection of marginal cost and marginal revenue results in a lower quantity and higher price for the monopolized product than would result in a competitive market.

Again, college football is not at all like most other industries. Because the marginal cost is zero for producers of televised college football, the marginal cost and marginal revenue curves never intersect. Dr. Landes' opinions in this case are based in large part on standard micro-economic theory involving the interplay of marginal revenue and marginal cost. However, in the case of college football television, the standard theory has no application due to the absence of the marginal cost element. The assumptions which underlie Dr. Landes' conclusions are therefore incorrect, and the Court can give no weight to the conclusions he has reached on the basis of those assumptions.

Dr. Landes' study is fallible in other key respects. For instance, Dr. Landes concludes that NCAA does not have market power because it cannot reduce output and thereby raise prices as would the ordinary monopolist. He bases his conclusion on the fact that both the price and the number of games shown have increased over the years.

This conclusion is suspect for two reasons. First, even if it were true that NCAA has not reduced output, that certainly does not mean that it does not have the power to do so. Second, Dr. Landes apparently assumes that at some time in the past, the number of games shown on television was equal to the number which would have been shown in the absence of the controls. Unless that assumption is correct, the fact that the number of games televised has increased over the years proves little if anything. The question is not whether NCAA has

reduced output from one year to the next. Rather, the question is whether NCAA has, throughout the history of the controls, kept output below the level which would have occurred in a free market.

The Court has found as fact that many more college football games would have been televised in the past were it not for the NCAA controls. That being the case, it is easy to understand why both price and output have increased, when in the ordinary monopolized market, output is decreased while prices rise.

The reason for this departure from the ordinary monopoly model is that NCAA has been a monopolist from almost the very moment the market came into being. Ordinarily, once a product comes into being, a number of firms enter the market and compete with one another. Eventually, one of the firms may achieve prominence in the market either by preying on smaller firms or by superior competitive practices. Only when the prominent firm has achieved a monopoly does it reduce output and raise prices.

In the case of NCAA and college football television, the market has always been monopolized. From practically the very time college football television came into being, NCAA has monopolized the product. NCAA restricted output from the very beginning. The current output of televised college football remains far less than that which would occur in a free market. It is therefore cavil to say that a marginal increase in the number of games NCAA allows to be televised indicates an absence of market power. Dr. Landes' assumption that output and price under the NCAA controls were at some point the same as they would have been in a free market is incorrect.

Once a firm has achieved a monopoly position in an industry, reduced output and raised prices, it maintains its monopoly price by marginally increasing output and prices. The only difference between NCAA and the classic monopolist

is that NCAA has monopolized the market from the outset. Having done so, it maintained its monopoly price by allowing only marginal increases in the number of television exposures per season. At no point has NCAA allowed the number of exposures which a free market would bear.

Dr. Landes fails to take into account the fact that NCAA has controlled the market from the time the market came into being. He makes no attempt to compare output and prices under NCAA's controls to the output and prices which would be expected in a free market. By merely observing a monopolized market and incorrectly assuming that it was at some point a free market, he assumes his result and begs the question. Dr. Landes' analysis of the price of college football television therefore proves nothing, and is of little assistance in resolving the issues before the Court.

Dr. Landes' study of advertising patterns is equally unpersuasive. The plaintiffs have argued that college football has a unique appeal to advertisers. This would explain their willingness to pay a very high price to advertise on college football despite the fact that the viewing audience is small compared to most prime time programming. Dr. Landes sought to rebut this argument by analyzing the conduct of the firms which advertise on NCAA football.

Dr. Landes computed the amount spent by NCAA football advertisers for all of their network advertising during the year 1981. Dr. Landes then studied the amount spent by these advertisers for commercial time on NCAA football telecasts, the amount spent for commercial time on all sports programming, and the amount spent for commercial time on non-sports programming. The average amount spent by these advertisers for commercial time on NCAA football telecasts constituted only 5.18% of the total amount these advertisers spent on network advertising in 1981. Dr. Landes concluded from this fact that these advertisers were not tied to NCAA football, and

freely substituted other programming for airing their commercials.

At first blush, it seems that Dr. Landes' point is well-taken. However, further inquiry reveals that the figures upon which Dr. Landes relies in fact support the opposite conclusion. Consider the following. In 1981, there were 24 exposures of NCAA football. Each exposure lasted approximately three hours. Therefore, there were only 72 hours of regular season college football on network television in 1981. Next consider that each of the networks provide an average of approximately 15 hours of programming on each day of the calendar year. Therefore, the total amount of network programming was about 16,425 hours in 1981. NCAA football comprises only .0044% of the total network programming on which an advertiser could have purchased commercial time in 1981.

This figure puts Dr. Landes' study in a new light. Those advertisers which bought commercial time on network telecasts of NCAA football spent an average of a little more than 5% of their total network advertising budget on programming which constituted less than .005% of the total programming available in 1981. In other words, network college football drew from these advertisers over 1000 times more of a percentage of their advertising budgets than its percentage share of total available programming. Obviously, this figure overstates the point, since some programming is not suitable for some advertising. Insurance companies, for instance, do not buy commercial time on children's programs. However, this analysis clearly indicates that in the view of these advertisers, the benefits of advertising on college football telecasts are worth an extraordinarily large percentage of their advertising budget in proportion to the total amount of programming which is available. Add to this the fact that college football advertisers spend 2½ times more per viewer to advertise on NCAA football than is paid on the average to advertise on other programming—a fact to which defense expert witness Klein testified—and the fact of college

football television's extraordinary appeal to advertisers clearly emerges.

All of this leads to a conclusion contrary to that reached by Dr. Landes. It is clear that in the minds of both the networks and the advertisers, there is no close substitute for college football. The only programming which can compare to college football is professional football. Yet the two never compete because of the terms of the anti-trust exemption granted by Congress to the National Football League. Dr. Landes' attempt to understate the great appeal of college football television is unpersuasive.

Finally, the Court notes that Dr. Landes does not include in any of his studies an analysis of the contracts between NCAA and ABC and CBS for the 1982 to 1985 seasons. The prices to be paid by the two networks in coming years seriously undercut Dr. Landes' conclusions. In 1981, ABC paid a minimum aggregate fee of $31 million for 24 exposures. In 1982, ABC and CBS have agreed to pay a total of $59 million for only 28 exposures. By 1985, the networks will pay $72 million for 28 exposures. There is no other network programming, with the possible exception of professional football, which could command such a dramatic price increase with so small an increase in output. Again, Dr. Landes' conclusions are seriously undermined and utterly unpersuasive.

The only other evidence presented by NCAA on the matter of relevant market was the testimony of Mr. Paul Klein, a former programming executive at NBC and an expert on the television industry. Like Dr. Landes, Mr. Klein is very knowledgeable of the matters to which he testified. However, like Dr. Landes, the conclusions he draws from the facts he presents do not hold up when closely scrutinized.

Mr. Klein testified that all other programming is substitutable for college football in the view of both the networks and their advertisers. He observed that if there were no college

football on the networks, advertisers would simply buy commercial time on other programs as a substitute. But this observation hardly supports the conclusion that all other programming is freely substitutable.

The economist's term for substitutability or interchangeability of products is "cross-elasticity of demand." "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other." *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 400, 76 S.Ct. 994, 1009, 100 L.Ed. 1264 (1956). Thus, for Mr. Klein to observe that advertisers would switch to other programming if there were no college football on television tells us nothing. The question is not whether buyers will substitute other products if a certain product disappears. If automobiles disappeared tomorrow, consumers might well substitute bicycles, yet no one would seriously argue that bicycles and automobiles compete in the same product market. Rather, the question is whether a rise in the price of college football television rights fees would cause the networks to substitute other programming. The evidence is clear that they would not.

A comparison between the minimum aggregate fee paid by ABC in 1981 and the fees which will be paid by ABC and CBS in the next four years shows that the network demand for other programming is not responsive to increases in the price of college football. In 1981, ABC paid $31 million for the right to telecast college football 24 times. The price per exposure was approximately $1.3 million. In 1982, ABC and CBS have agreed to pay $29.5 million for 14 exposures, an average of about $2.1 million per exposure. Thus, in a single year, the price to the networks of college football has increased by about 62% per exposure. The networks have each agreed to pay $36 million for 14 exposures in 1985, or almost $2.6 million per exposure, an 100% increase over the 1981 price.

It is also clear that the networks expect to charge a higher price for commercial time. In 1981, ABC was allowed to show 506 minutes of commercials during NCAA football telecasts. ABC paid approximately $61,300 per commercial minute under its contract with NCAA. In 1982, the contracts allow 26 minutes of commercial time on each of the 14 exposures which each network will carry, or a total of 364 minutes per network. Each network has therefore agreed to approximately $81,000 per commercial minute, a 32% increase in a single year. The networks have agreed to pay $98,900 per commercial minute in 1985, or 61% more than the 1981 price. Assuming that the networks do not plan to lose money, these increases will be passed on to advertisers. By agreeing to these startling increases in price, it is clear that the networks believe that advertisers will pay these higher prices.

It can thus be said with reasonable certainty that if there were other programming which is freely substitutable for college football in the view of the networks and the advertisers, the dramatic price increases called for in the 1982 to 1985 contracts would cause both the networks and advertisers to substitute that other programming. The fact that they have not substituted other programming is a clear indication that college football does not compete with all other programming. Rather, this analysis indicates that college football television is truly a market unto itself, in the view of both the networks and the advertisers.

Mr. Klein also offered his opinion that college football does not have infinite appeal to the networks. He testified that if the price of college football should become too high, the networks will substitute other programming. Again, while this is undoubtedly true, it does little to resolve the issue. Any monopolist can raise prices so high as to destroy demand for the product. But this does not mean that other products are readily interchangeable. It simply means that a monopolist can ultimately destroy the market for its product by charging a price

that is too high. The fact that NCAA has not destroyed the market for college football television proves nothing.

Therefore, the evidence presented by the defendant is unpersuasive. The plaintiffs have proved that live college football television is a unique product for which there is no ready substitute. In a sense, it is difficult to understand the tremendous appeal of college football to the networks and their advertisers. Certainly the color, pageantry and tradition of the sport, and the interest of alumni in the sport, are significant factors. Whatever the reason, it is clear that there is no substitute in the minds of the networks and advertisers. They pay an enormous cost to reach an audience which is small relative to prime time programming. The networks are willing to allow NCAA to substantially dictate the conditions under which they may televise college football. The networks may even be willing to lose money on college football in return for some intangible benefits they believe themselves to derive from merely being associated with the sport. It is clear that college football does not compete with other television programming in any real sense, that it is a market unto itself, and that it is the relevant market for determining whether NCAA exercises monopoly power.

Having so defined the relevant market, it is clear that NCAA exercises monopoly power. "When a product is controlled by one interest, without substitutes available, there is monopoly power." *United States v. E.I. DuPont de Nemours & Co., supra,* at 394, 76 S.Ct. at 1006. In this case, NCAA controls all of regular season college football television. The amount of televised college football not involving NCAA members is negligible, if it exists at all. NCAA has the power to reduce output and fix prices in the relevant market. It has formed an insurmountable barrier to the entry of competitors into the market by prohibiting its members, under threat of sanctions, from televising their games other than pursuant to the NCAA controls. Indeed, NCAA makes no attempt to deny

that if college football television is the relevant market, it is a monopolist. Therefore, the Court concludes that NCAA has monopolized the market of college football television, in violation of § 2 of the Sherman Act.

D. *Relief under the Clayton Act*

When a violation of the Sherman Act has been established, injunctive relief is available under the Clayton Act "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26 (1980). The plaintiffs have met the prerequisites for relief by showing that NCAA has violated the Sherman Act; that they have suffered antitrust injury proximately caused by NCAA's antitrust activities; that they face a clear probability of future injury if an injunction does not issue.

Before turing to the specifics of the relief which will be granted, the Court first notes that NCAA has raised the defense of *in pari delicto* to the plaintiffs' claims. There is substantial doubt as to whether the defense can be raised at all in antitrust matters. *See Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968). The Court does not need to resolve this difficult question, because even if *in pari delicto* remains a viable defense, the facts of this case do not support the defense for several reasons.

First, it simply cannot be said that the alleged wrongful acts of the plaintiffs are in any way equal to the wrongful conduct of the defendant. There is no evidence to show that either Oklahoma or Georgia were protagonists in the creation of the NCAA college football television controls. While they have received substantial revenues under the NCAA controls of the past, it is likely that they would have realized even more revenue in the absence of the NCAA controls. Beginning in 1952, NCAA has expanded its control over football television to the point that its power is absolute. This expansion of

territory has been accomplished at the expense of the rights of schools such as the plaintiffs, and often over their objection, particularly in recent years. The plaintiffs, along with a number of their CFA allies, have attempted to address these problems in the forums provided by NCAA. They have been thwarted at every turn by the NCAA membership, which took its direction from the NCAA administration. NCAA is clearly the bad actor in this situation. Whatever wrongs the plaintiffs may have committed, they are overshadowed by the scope of the illegal actions taken by NCAA itself.

Second, the fact that the plaintiffs are currently making agreements with the networks pursuant to the challenged contracts does not provide grounds for the *in pari delicto* defense. This case provides a classic example of the "economic coercion" and "business necessity" exceptions to *in pari delicto*. *See Thomas v. City of Richmond,* 79 U.S. (12 Wall.) 349, 355, 12 L.Ed. 453 (1870); *Ring v. Spina,* 148 F.2d 647 (2d Cir. 1945). When the plaintiffs and CFA attempted to withdraw from the NCAA's football plan, they were met with a campaign of veiled threats and coercion. These activities ceased only after the Court ordered that they cease. However, the damage had already been done. The NCAA threats hung like a shroud over the deliberations of CFA members as to whether to join in the NBC contract. The threats of NCAA sanctions, not only against the football programs but against all sports, were clearly intended to, and achieved the ultimate effect of, coercing the plaintiffs and others into continued participation in the NCAA cartel.

Similarly, the plaintiffs must make their agreements with ABC, TBS and CBS as a matter of business necessity. Since retributive measures would most certainly be taken by NCAA if the plaintiffs went to a network other than those with which NCAA has contracted, the plaintiffs must sell to these networks pursuant to the NCAA contracts or face a season without football television revenues. These revenues can constitute

millions of dollars in any given year, and the loss of these revenues would be a severe blow to the athletic programs run by the plaintiffs. In order to maintain their athletic programs, it is absolutely necessary that they continue to participate in the NCAA cartel. Therefore, this case falls into the "economic coercion" and "business necessity" exceptions to the *in pari delicto* doctrine.

Finally, the Court believes that the defense of *in pari delicto* has no application where, as here, the plaintiffs seek only equitable relief in the form of an injunction against continuation of the illegal scheme. As a matter of antitrust policy and as a matter of fundamental fairness, the doctrine simply should not be applied in cases such as this one.

> [C]ourts must recognize the need both to promote free and open competition and to prevent a wrongdoer from benefiting from his own misconduct. This can be accomplished by . . . allowing the *in pari delicto* defense to bar treble damage actions by plaintiffs within its ambit. Courts should not, however, allow the defense to preclude suits for injunctive relief against a defendant's continued wrongdoing if the plaintiff has ceased voluntarily to participate in the challenged arrangement. It is one thing to bar a plaintiff's damage recovery because the law does not reward wrongdoers for their own voluntary wrongdoings. It is entirely another . . . to deny the plaintiff a right to bring the illegal scheme to an end.

Handler and Sacks, *The Continued Vitality of In Pari Delicto as an Antitrust Defense,* 70 Georgetown L.J. 1123, 1152 (1982).

The plaintiffs are not voluntary members of the NCAA cartel. It would do extreme violence to the policies of the antitrust laws to allow a wrongdoer to interpose *in pari delicto* as a defense where the plaintiffs seek only equitable relief. The Court is convinced that where a participant in an illegal scheme either has withdrawn or is subject to sanctions from the other participants for seeking to withdraw, *in pari delicto* has no

application. L. Sullivan, *Antitrust* § 250 at 784-785 (1977). In this case, the plaintiffs faced the choice of continued participation in the NCAA cartel, or the financial devastation of their athletic programs and the accompanying deleterious effects on the students they serve. It would be unjust to bar their claims under the doctrine of *in pari delicto*, and it would make folly of Congress' antitrust policy. The Court declines to bar the plaintiffs' claims under this doctrine.

The only remaining issues as to the plaintiffs' right to injunctive relief are those traditionally considered by courts of equity. In this case, the traditional bases of equitable jurisdiction are present. The plaintiffs have no adequate remedy at law. The only remedy available is damages, but because NCAA has controlled the market so thoroughly, the plaintiffs could never prove with the requisite reasonable certainty the damages they have suffered. Moreover, even if damages could be proved, the plaintiffs would have to file a lawsuit every year to recoup the profits they lost the previous year due to the NCAA controls. Equity abhors a multiplicity of suits. It is clear, therefore, that there is no adequate remedy at law.

The Court is required to balance the equities between the parties in deciding whether to grant injunctive relief. In this case, the balance overwhelmingly favors the plaintiffs.

NCAA argues as to this issue that the fact that its television controls were adopted by an overwhelming majority vote of the membership should sway the scale in NCAA's favor. However, the Court has previously discussed the fact that the vast majority of NCAA members suffer none of the restrictions of the NCAA controls. Meanwhile, they do receive a substantial indirect benefit in that NCAA receives a large amount of revenue from the network contracts, which would otherwise not be available. This majority therefore has everything to gain and nothing to lose under the plan. It can hardly be said that this majority has acted in an equitable manner. Indeed, the

intransigence of the NCAA administration and its allies in the membership persuades the Court that injunctive relief should be granted.

NCAA also argues that the plaintiffs are mere surrogates of CFA, and that Georgia President Davison, a former officer of CFA, has brought this action to avenge the failure of the CFA-NBC contract. However, the Court finds no merit in this argument. The Court would note that the CFA-NBC contract failed in large part due to the campaign of veiled threats against CFA members conducted by NCAA. Had NCAA allowed the CFA-NBC contract to be judged on its merits by CFA members, this litigation might never have occurred. The Court would also note that Dr. Davison made clear to CFA as well as NCAA that it had no right to make a television contract on behalf of Georgia without his express permission. Dr. Davison's efforts to protect the rights of his institution have been consistent throughout this controversy, and the Court finds nothing in his acts, or those of CFA, which could be called inequitable.

NCAA next urges that the controls have been in effect for thirty years, that each of the plaintiffs has received the full financial benefits of those controls, and that it is inequitable for the plaintiffs to challenge the controls at this late date. Again, the NCAA's argument is without merit. Both of the plaintiffs have long been prominent football schools. It is likely that they have suffered a tremendous loss of revenue over these thirty years as a proximate result of the NCAA controls. The fact that they have suffered this injury for so long indicates benevolence rather than malevolence on their part. They have attempted to seek redress in the forums provided by NCAA, but have been thwarted by a majority which suffers none of the restrictions they have imposed on the plaintiffs. There is nothing inequitable about the plaintiffs' conduct to date. On the contrary, it is clear that NCAA is the wrongdoer. NCAA has commandeered the plaintiffs' rights to sell their football games. NCAA has

seized monopoly power by fiat, and has maintained that power by means of threats and coercion. The equities clearly favor the plaintiffs, and the Court will grant them the relief which they seek.

The Court has carefully considered the scope of the relief which should be granted. It is clear that the plaintiffs are entitled to a declaratory judgment affirming the fact that the right to sell their football games for telecast is a property right belonging to the plaintiffs themselves. NCAA has no such right. NCAA does nothing to assist in the staging of a game by an institution. It pays none of the costs of the event, and bears none of the risk that the event will cost more in expenditures than it will generate in income. It should not require a judicial decree to affirm the property rights of the plaintiffs, but the presumptuous seizure of these rights by NCAA makes such a decree necessary and appropriate.

It is also necessary, in order to accord full relief, to declare the contracts which NCAA has entered into with ABC, CBS and TBS to be illegal and therefore void and unenforceable. These contracts and their predecessors are the means by which NCAA has fixed prices, reduced output and monopolized the market. They are the source of threatened antitrust injury to the plaintiffs. They simply cannot be allowed to stand.

In furtherance of this declaration, it is necessary to enjoin NCAA from committing certain acts. NCAA shall be enjoined from attempting to enforce the provisions of the network contracts against both NCAA members and the networks. NCAA shall also be enjoined from acting as the exclusive agent for the sale of telecasting rights to the football games of member institutions, and from requiring as a condition of membership that member institutions grant to NCAA the right to control their telecasting rights. Each of these activities shall be prohibited forthwith.

The Court is well aware that the network schedules have been established for the 1982 college football season, and that many schools have executed contracts with ABC, CBS and TBS. The Court is also aware that, in many instances, the institutions involved have made expensive arrangements for changing the date or time of a game in order for it to be televised. However, several factors lead the Court to conclude that the injunction here described should take effect immediately.

First, it would be unseemly for the Court, having found an overt violation of the antitrust laws, to allow the violation to continue for even a single day, let alone for the rest of the current season. Such a course would imply that justice is timid, when it is not. The Court's actions must be swift and thorough in breaking up this combination which restrains trade, and they must leave no room for doubt as to the Court's intention to bring college football television into compliance with the Sherman Act.

Second, the Court finds that it is inimical to the policy of the antitrust laws to allow NCAA yet another year of ill-gained profit under the network contracts. NCAA is scheduled to receive between five and six million dollars from the networks this year. They would receive this money only because they have fixed prices, reduced output and monopolized the market. It is unthinkable, in the view of the Court, to allow NCAA any further profit from its anti-competitive activities. The Court is aware of NCAA's dependence on these revenues, and the purposes to which they are put. Nonetheless, to allow NCAA to continue to profit from its wrongdoing would only aggravate a bad situation. Violators of the antitrust laws should not be allowed to retain the benefits of their wrongful acts. *Schine Chain Theatres, Inc. v. United States,* 334 U.S. 110, 128, 68 S.Ct. 947, 957, 92 L.Ed. 1245 (1978).

Therefore, NCAA shall be enjoined not only from attempting to enforce the contracts now in effect, but also from making

any future contracts which purport to grant any telecaster the right to televise the football games of member institutions. NCAA shall also be enjoined from requiring as a condition of membership that an institution grant NCAA the power to sell its television rights. Both the contracts and the condition of membership are essential to NCAA's antitrust scheme, and the Court must therefore render them inoperative. The Court must also act to prevent any future illegal contracts. While NCAA protests that there is no need to prohibit future contracts, "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States*, 332 U.S. 392, 400, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947). NCAA has acted with the clear purpose of restraining trade. By forbidding NCAA to contract on behalf of its members, the Court forecloses the possibility that NCAA will accomplish its anticompetitive purpose by means of more subtle contractual provisions in the future.

NCAA insists that it will cease all illegal conduct and that an injunction is therefore unnecessary. However, "there [is] nothing indicating that this clear violation of the antitrust laws [has] terminated or that the threat to [the plaintiffs] inherent in the conduct [will] cease in the foreseeable future. Neither the relative quiescence of the [defendant] during the litigation nor claims that objectionable conduct [will] cease with the judgment [negates] the threat to [the plaintiffs]." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra*, 395 U.S. at 131, 89 S.Ct. at 1580. The Court cannot accept NCAA's claim that it will voluntarily abandon its antitrust activities. NCAA has long been aware of the antitrust implications of its football television controls, and yet its most recent activities only prolong through at least 1985 the most pernicious aspects of the controls. It is clear that the Court must act, because NCAA cannot be expected to conform its conduct to the law in the absence of an

order of the Court. Having found a violation of the Sherman Act, the Court is duty-bound to "render impotent the monopoly power which violates the Act." *Schine Chain Theatres v. United States, supra,* 334 U.S. at 129, 68 S.Ct. at 957.

Finally, the Court will, in its discretion, retain continuing jurisdiction in this matter. The injunction which will issue may well lead to circumstances which cannot at this time be foreseen. It is therefore appropriate for the Court to retain jurisdiction for the purposes of monitoring compliance with this injunction and modifying or expanding the relief granted to meet the circumstances which result from the Court's decision in this matter.

It is regrettable that an organization such as NCAA, which has served many useful purposes over the years, should be found to be in violation of the laws of the United States. The Court would only observe that the wound which has today been suffered by NCAA is a self-inflicted wound. NCAA has strayed far from the purposes for which it was organized. The Court does not know and need not determine whether the NCAA administration, in formulating the controls at issue, was motivated by genuine concern for NCAA members, by a lust for power, or by rank greed. What is clear is that NCAA has violated the antritrust laws, and that the Court's duty is to restore competition to this monopolized industry.

It is the Court's fond hope and genuine belief that the result of this litigation will be an open and competitive market which will ultimately serve the best interests of the football-playing colleges, the telecasters, television advertisers and, most importantly, the viewers of college football television. Congress has determined that free competition will yield this result and that therefore competition shall be the rule of commerce in our nation. By its decision today, the Court gives effect to that rule.

IN THE UNITED STATES DISTRICT COURT

For the Western District of Oklahoma

Civil No. 81-1209-BU

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, AND THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

THIS MATTER having come on for a trial on the merits to the Court, and the Court having considered the evidence, pleadings, memoranda and briefs submitted by the parties, and being otherwise fully advised in the premises, and the Court having entered concurrently herewith its findings of fact and conclusions of law,

IT IS ORDERED, ADJUDGED AND DECREED:

(1) The right to telecast college football games is the property of the institutions participating in the games, and that right may be sold or assigned by those institutions to any entity at their discretion;

(2) The contracts for the televising of college football for the 1982-1985 seasons between National Collegiate Athletic Association and American Broadcasting Companies, Columbia

Broadcast System and Turner Broadcast System violate Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and are therefore void and of no effect;

(3) National Collegiate Athletic Association, its officers, agents and employees, shall be and hereby are enjoined from enforcing or attempting to enforce the provisions of the contracts above described and from making any other contract of similar kind or nature in the future;

(4) National Collegiate Athletic Association, its officers, agents or employees, shall be and hereby are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games;

(5) The plaintiffs shall recover their costs and reasonable attorneys fees expended in the prosecution of this action, and counsel for plaintiffs shall submit to the Court in affidavit form a statement of their attorneys fees in accordance with the guidelines found in *Francia v. White*, 594 F.2d 778 (10th Cir. 1979); and

(6) The Court shall retain jurisdiction over this matter for the purpose of monitoring compliance with this order and for the purpose of modifying the relief granted or of granting further relief should circumstances so require.

DATED at Albuquerque, New Mexico, this 14th day of September, 1982.

United States District Judge
for the District of New Mexico
Sitting by Designation

ENTERED IN JUDGMENT DOCKET ON
SEP 15 1982

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Tenth Circuit

MARCH TERM—May 12, 1983

Before Honorable James E. Barett, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a public body corporate; THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a non-profit corporation, Individually and as Representative of the Class,

Plaintiffs-Appellees,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant,

ABC SPORTS, INC., NATIONAL FEDERATION OF HIGH SCHOOL ACTIVITIES ASSOCIATIONS, NATIONAL ASSOCIATION FOR EQUAL EDUCATION OPPORTUNITY, INC., NATIONAL BLACK MEDIA COALITION, INC., BLACK MISSISSIPPIANS COUNCIL ON HIGHER EDUCATION, NATIONAL CONFERENCE OF BLACK LAWYERS, INC., and VIEWERS OF THE SOUTH, UNITED STATES OF AMERICA and ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,

Amici Curiae

No. 82-2148

(D.C. No. CIV-81-1209-BU)

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. The cause is remanded to the United States District Court for the Western District of Oklahoma to consider its injunction in light of the views expressed in the opinion of this court.

/s/ HOWARD K. PHILLIPS

Howard K. Phillips, *Clerk*

APPENDIX D

MAY TERM—June 23, 1983

Before Honorable Oliver Seth, Honorable James E. Barrett, Honorable William E. Doyle, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

No. 82-2148

THE BOARD OF REGENTS OF
THE UNIVERSITY OF OKLAHOMA, et al,
Plaintiff-Appellees,

vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant,

ABC SPORTS, INC., et al,
Amici Curiae.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Judge Barrett voted to grant rehearing.

The court having been polled on the suggestion for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judge Barrett voted to grant rehearing en banc.

Judges Holloway, McWilliams and McKay did not participate in consideration of the petition for rehearing en banc.

HOWARD K. PHILLIPS, Clerk

/s/ ROBERT L. HOECKER
By Robert L. Hoecker
Chief Deputy Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-24

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

ON APPLICATION FOR STAY

[July 21, 1983]

JUSTICE WHITE, Circuit Justice.

The application for a stay is granted, and the temporary stay of the judgments of the Court of Appeals and the District Court is continued pending the timely filing and disposition of a petition for writ of certiorari in the above-entitled action. If the petition is denied, this stay will terminate automatically. If certiorari is granted, the stay will continue in effect, pending judgment on the merits or other disposition of the case. Briefly stated, the reasons for granting the stay are as follows.

The National Collegiate Athletic Association is a private, non-profit association of some 900 four-year colleges and universities meeting certain academic standards and of athletic conferences, associations, and other groups interested in intercollegiate athletics. Of these, some 800 are voting members, about 500 field football teams, and 187 are so-called division I schools. These latter schools, the District Court found, dominate college football television.

The NCAA regulates many aspects of intercollegiate athletics, including the televising of intercollegiate football games, the arrangements for which it has controlled since

1953. The current plan involves contracts with two networks, CBS and ABC, covering the 1982–1985 seasons, as well as a two-year contract with the Turner Broadcasting System. The District Court, in describing the contracts, stated that each network must broadcast a game on at least 14 different dates, and each must televise at least 35 games each year. At least seven broadcasts must be national and at least six regional. The networks select the games they will broadcast, at least 82 different teams must appear on each network over a two-year period, and no school may appear more than six times during a two-year period. Each network is obligated to pay a minimum of $131,750,000 over the four years; TBS will pay $17,696,000 over two years. From these sums, the NCAA takes a percentage, certain sums are reserved for participants in the Division II and III competitions, and the balance is divided equally among those schools who have appeared on the broadcasts covered by the contracts. Schools not selected to appear under the contract are not permitted to make their own arrangements to broadcast their games, and schools that do appear may not undertake to have additional games televised.

The Regents of the University of Oklahoma and the University of Georgia Athletic Association brought this action against the NCAA, asserting that the NCAA's regulatory scheme violates the antitrust laws. The District Court agreed, holding that the scheme constituted price-fixing that was illegal *per se* under § 1 of the Sherman Act and the relevant cases; it also held that the arrangement was an illegal group boycott, was monopolization forbidden by § 2, and was in any event an unreasonable restraint of trade. The contracts were declared null and void, and an injunction was entered forbidding their further implementation.

The Court of Appeals for the Tenth Circuit, while disagreeing with the boycott and monopolization holdings, otherwise upheld the decision of the District Court. Although it ordered the judgment affirmed, it remanded with instruc-

tions that the District Court "consider its injunction in light of" the Court of Appeals' opinion. The Court's mandate has issued. The NCAA, asserting that it will petition for certiorari, has requested a stay; the respondents have opposed the stay, as has the United States as amicus curiae.

Having examined the papers so far filed with me and assuming that they fairly represent the issues and what has occurred in this case, I can say with confidence that I would vote to grant certiorari. Somewhat less confidently, I expect that at least three other Justices would likewise vote to grant. The judgment below would obviously have a major impact countrywide, and the case plainly presents important issues under the antitrust laws.

I also have little doubt that if the case is to be granted the equities pending decision on the merits are with the NCAA. The two respondent schools might do better for themselves during the 1983 season if they were free to go their own way, but were a stay to issue, their harm would be limited to the difference between what they would receive under the NCAA arrangements and what they could otherwise garner. On the other hand, unless the judgment is stayed, it would appear that the networks' contracts would be void under the outstanding judgment and could not be enforced; the entire 1983 season would be at risk not only for the NCAA but for many, if not most, of the schools which it represents, including many schools that would prefer the NCAA arrangements to continue at least through the 1983 season.

Although the question is a close one, I am also of the view that there is a sufficent likelihood that the court below erred in one or more important respects to justify issuing the stay. For example, the *per se* price-fixing holding is questionable to my mind; also, although in the long run I may agree with the courts below in this respect, I have some doubt whether they reached the correct result under the Rule of Reason.

Accordingly, having determined that certiorari will likely be granted, that there is a sufficient prospect that the NCAA

will ultimately prevail, and that the equities favor the NCAA, I conclude that a stay is in order.

Respondents suggest that the NCAA should be required to post bond if the stay is granted. I am not inclined to impose that requirement. I note that the Court of Appeals stayed the judgment of the District Court without bond while the case was on appeal to it. I see no need to change that procedure.

Office - Supreme Court, U.S
FILED
DEC 1 1983
STEVAS

No. 83-271

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX: VOLUME I

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PETITION FOR CERTIORARI FILED AUGUST 13, 1983
CERTIORARI GRANTED OCTOBER 17, 1983

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RELEVANT DOCKET ENTRIES, DISTRICT COURT

Docket No. CIV-81-1209

FILINGS—PROCEEDINGS

Date	
9/8/81	COMPLAINT
9/8/81	ORDER to Show Cause and Temporary Restraining Order, set for Sept. 17th, 1981 at 9:30 a.m. (West for Eubanks) * * *
9/16/81	ORDER that the TRO entered 9-8-81 shall remain in full force & effect except as hereinafter modified: 1) that the TRO entered by this Ct does not apply to television rights for the collegiate football seasons prior to the year 1982; 2) paragraph (b) of the TRO is modified as follows: the NCAA is restrained & enjoined fm initiating any contact w/CFA member institution in which it threatens disciplinary action or sanctions agnst any CFA member assigning or exercising its football television rights other than through the NCAA; the NCAA is free to answer any & all questions propounded to it by any member institution regarding the rules & regulations, including rules as to sanctions of the NCAA; it is free to meet w/any and all of its members to discuss any appropriate action to be taken, including actions relating to the litigation; furthermore, the NCAA may resp to inquiries by the news media concerning the litigation & the position of the NCAA (Eubanks)
9/17/81	ENTER evidentiary hrg. * * *
9/18/81	ENTER further evidentiary hrg. Plf continues case in chief w/test of witnesses; * * * plf rests; dft to put their evidence on at later time; TRO order cont'd in full force & effect * * *
10/20/81	ANSWER of dft The Nat'l Collegiate Athletic Ass'n to plfs' compl

11/20/81	TEMPORARY RESTRAINING ORDER the Ct finds that it is necessary that pending the resumption of the hrg on prelim. inj., the parties be temporarily restrained as follows: 1) NCAA is ordered not to take any steps to commence any disciplinary actions or sanctions agnst the Univ. of Okla. or the Univ. of Ga. (or its athletic association); 2) NCAA is ordered not to enter into or implement any contract which purports to bind the Univ. of Okla. or the Univ. of Ga. (or its athletic ass'n) to televise or cablecast their football games after 1981 (Eubanks) * * *
2/11/82	ENTER Order this case is transferred to Judge Juan Burciaga; * * * (Eubanks)
6/7/82	ENTER NONJURY TRIAL * * *
6/8/82	ENTER FURTHER NONJURY TRIAL * * *
6/9/82	ENTER FURTHER NONJURY TRIAL: * * * plf rests * * *
6/10/82	ENTER FURTHER NONJURY TRIAL * * *
6/11/82	ENTER FURTHER NONJURY TRIAL * * *
6/14/82	ENTER FURTHER NONJURY TRIAL * * *
6/15/82	ENTER FURTHER NONJURY TRIAL: * * * ptys rest * * *
9/15/82	MEMORANDUM OPINION (BURCIAGA) * * *
9/15/82	DECLARATORY JUDGMENT AND PERMANENT INJUNCTION: The right to telecast college football games is the property of the institutions participating in the games, and that right may be sold or assigned by those institutions to any entity at their discretion; the contracts for the televising of college football for the 1982-1985 seasons between National Collegiate Athletic Association and American Broadcasting Companies, Columbia Broadcast System and Turner Broadcast System violate Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and are therefore void and of no effect; National Collegiate Athletic Association, its of-

ficers, agents and employees, shall be and hereby are enjoined from enforcing or attempting to enforce the provisions of the contracts above described and from making any other contract of similar kind or nature in the future; National Collegiate Athletic Association, its officers, agents or employees, shall be and are enjoined from prohibiting member institutions from selling or assigning their rights to telecast the college football games in which they participate, and from requiring as a condition of membership that those institutions grant to National Collegiate Athletic Association the power to control those institutions' rights to telecast college football games; the plaintiffs shall recover their costs and reasonable attorneys fees expended in the prosecution of this action, and counsel for plaintiffs shall submit to the Court in affidavit form a statement of their attorneys fees in accordance with guidelines found in Francis v. White, 594 F.2d 778 (10th Cir. 1979); and the Court shall retain jurisdiction over this matter for the purpose of monitoring compliance with this order and for the purpose of modifying the relief granted or of granting further relief should circumstances so require (BURCIAGA) (COB #152) (ENTERED: Clerk) * * *

9/17/82 NOTICE OF APPEAL by defendant from a final judgment rendered by the Court and entered Sept. 15, 1982

RELEVANT DOCKET ENTRIES, COURT OF APPEALS

Docket No. 82-2148

DATE	FILINGS—PROCEEDINGS
9/20/82	CS.DKT. Case docketed.
10/12/82	ROA.F. Record on appeal filed: Vo. I-III (Pleadings, 1,051 pp); Vol. IV (Transcript, 35 pp); Vol. V-XIII (Exhibits); Vol. XIV-XX (Depositions); Vol. XXI-XXVII (Transcripts, 1,385 pp); originals: (2,471 T pp).
10/13/82	* * * BR.F Brief of ABC Sports (amicus) filed * * *
10/13/82	* * * BR.F Appellant's brief filed * * *
10/13/82	* * * BR.F Amicus brief (National Federation of High School Assoc.) brief filed * * *
10/18/82	* * * BR.F Amicus brief of Natl. Assoc. for Equal Education Opportunity, National Black Media Coalition, Black Mississippians Council on Higher Education, Natl. Conf. of Black Lawyers, Viewers of the South filed * * *
11/4/82	BR.F Amicus brief of United States of America filed * * *
11/4/82	BR.F Amicus brief of Association of Independent Television Stations, Inc., filed * * *
11/5/82	BR.F Appellee's brief filed * * *
11/15/82	BR.F Appellants' reply brief filed * * *
11/17/82	BR.F Amici brief of National Association for Equal Education Opportunity, et al., filed * * * (reply brief)
11/18/82	CS.ARG.SUBM—Barrett, Logan, Seymour
12/10/82	APX.F Appellant's and appellee's joint, deferred appendix filed, Vol. I (pl.), 10cc., Vol. II (trans.), 10cc., Vol. III (trans.), * * * plaintiff's exhibits * * * defendant's exhibits * * *
12/16/82	BR.F Appellant's brief (with appendix references) filed * * *
5/12/83	OPN.F. Published, signed opinion filed. Barrett, Logan, Seymour Writing Judge is Logan

5/12/83	JM.DISP. Judgment affirmed. The cause is remanded.
5/12/83	DIS.OPN.F. Dissenting opinion filed. Writing judge is Barrett
5/26/83	P.REHRG.ENB.F Appellant's petition for rehearing en banc filed. * * *
6/23/83	P.REHRG.ENB.DISP. Order: Appellant's petition for rehearing en banc denied. En banc panel. * * *
7/11/83	MDT.ISS. Mandate issued to district court.
7/21/83	RMF.F. Copy of order from Supreme Court staying judgment of 5/12/83 * * *

IN THE UNITED STATES DISTRICT COURT FOR THE
Western District of Oklahoma

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a public body corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a nonprofit corporation, Individually and as Representatives of the Class, *Plaintiffs,* v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *Defendant.*	No. CIV-81-1209-E

COMPLAINT
(Filed September 8, 1981.)

Plaintiffs, The Board of Regents of the University of Oklahoma and The University of Georgia Athletic Association, by their attorneys, for their complaint against the defendant, the National Collegiate Athletic Association ("NCAA"), allege as follows:

JURISDICTION AND VENUE

1. Plaintiffs bring this action under Sections 1 and 2 of the Act of Congress of July 2, 1890, as amended, (15 U.S.C., Sections 1 and 2) commonly known as the Sherman Act, Section 16 of the Clayton Act (15 U.S.C., Section 26), the declaratory judgment relief act, 28 U.S.C., Section 2201, *et seq.*, and state statutory and common law, requesting preliminary and permanent injunctive relief from present and future violations of the defendant NCAA of the Sherman Act, the Clayton Act, and state statutory and common law.

2. This court has jurisdiction of this action under the provision of 28 U.S.C., Section 1337 and pendent jurisdiction over the state law claims.

3. Defendant transacts and does business within this District. Venue is proper in this District pursuant to 28 U.S.C., Section 1391 and 15 U.S.C., Section 26. All parties hereto are engaged in interstate commerce in *inter alia*, the sale of television broadcast rights to intercollegiate football games.

THE PARTIES

4. Plaintiff The Board of Regents of the University of Oklahoma, hereinafter referred to in the singular as "OKLAHOMA", is a public body corporate and agency of the State of Oklahoma and is a member of the College Football Association ("CFA") and the NCAA.

5. Plaintiff The University of Georgia Athletic Association, hereinafter referred to in the singular as "GEORGIA", was at all times herein mentioned and is now a nonprofit corporation organized under and existing by virtue of the laws of the State of Georgia, and is a member of the CFA and NCAA.

6. Defendant NCAA is an association of colleges, universities, and related entities including plaintiffs and all members of the class defined below. The NCAA sanctions varsity intercollegiate athletic competitions in more than twenty (20) sports, including football, basketball, baseball, hockey, lacrosse, and soccer, and it sponsors seventy-two (72) national championships in nineteen (19) sports. As a practical matter, participation by an institution of higher education in varsity intercollegiate athletics is possible only if such institution is a member of the NCAA and only pursuant to the rules and regulations of the NCAA.

CLASS ALLEGATIONS

7. The College Football Association ("CFA") is an unincorporated voluntary association formed in June, 1977 and located in Leawood, Kansas. It is composed of sixty-one (61) institutions of higher education that have indicated commitments to major college football programs.

8. Plaintiffs are member institutions of the CFA and bring this action for themselves and on behalf of all such member institutions. The plaintiffs and all other members of the CFA, as well as the CFA itself, are members of the NCAA.

9. The plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. The class is defined as all member institutions of the CFA and is so numerous that joinder of all members is impractical. There are questions of law and fact common to the class because, as set forth more fully in the substantive allegations below, the actions of the parties herein and the legal consequences thereof arise out of and relate to the class members' membership in the CFA. The claims of the plaintiffs are typical of the claims of the class, and the plaintiffs will fairly and adequately protect the interests of the class.

10. The claims of the named plaintiffs are compatible with and not antagonistic to those of the members of the class.

11. As set forth in the substantive allegations below, the defendant has acted and will act, unless enjoined, on grounds generally applicable to the class. Injunctive and corresponding declaratory relief with respect to the class as a whole is appropriate.

SUBSTANTIVE ALLEGATIONS

12. The plaintiffs, the CFA, and all members of the class are members of the NCAA.

13. In 1977, the NCAA contracted on behalf of its member colleges and universities, including plaintiffs, with the American Broadcasting Companies, Inc. and ABC Sports, Inc. (collectively referred to as "ABC") for telecast of college football games. The contract entered into between the NCAA and ABC expires at the conclusion of the 1981 football season.

14. Due to the expiration of the NCAA-ABC contract at the end of the 1981 football season, the NCAA began preliminary discussions with the major networks for the telecasting of college football games after the expiration of the contract.

15. In anticipation of the expiration of the NCAA-ABC contract, plaintiffs and the members of the class authorized the CFA to explore with various television networks the feasibility of their entering into a contract for the telecast of college football games separate and apart from any contract that might be negotiated by the NCAA.

16. The Constitution and Bylaws of the NCAA empower the NCAA to promulgate rules governing the conduct of intercollegiate athletic programs of member institutions with regard to basic athletic issues such as admissions, financial aid, eligibility and recruiting.

17. The Constitution and Bylaws of the NCAA empower it to promulgate rules governing the conduct of intercollegiate athletic programs of member institutions and empower the Council of the NCAA to appoint committees, including the Television Committee, the actions of which are subject to approval by the NCAA Council. Bylaw 11-3(aa), which establishes the Football Television Committee provides:

> "The Football Television Committee shall consist of eight representatives from Division I-A Football, one representative at large from Division I-AA, one representative at large from Division II, one representative at large from Division III and two women. One Division I-A Football representative shall be appointed from each of the eight NCAA districts. The Divisions I-AA Football, II and III representatives shall be current or former members of the Divisions I-AA, II or III Football Committees. The Committee shall be responsible for the formulation and administration of the Association's Football Television policy and program, subject to the approval of the membership."

18. Because of the interest expressed by plaintiffs and members of the class in exploring negotiations independent of the NCAA leading to an independent contract for the telecasting of college football games after 1981, and with the specific design and intent to suppress such independent negotiations and to prevent execution of any such independent contract, the NCAA on or about April 18, 1981, issued an Official Interpretation of Bylaw 11-3(aa) (the "Official Interpretation"), which seeks to usurp the class members' control over their own property rights—to-wit, the rights to telecast their football games. The Official Interpretation of Bylaw 11-3(aa) states in full:

> "The Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season as defined in O.I. 307. The terms of principles of the control shall be set forth in a television plan or program which periodically shall be prepared by the Football Television Committee, approved by the NCAA Council for submission to the membership by a mail referendum and approved by at least two-thirds of the members voting a procedure which has been followed by the NCAA membership on a regular basis for approximately 30 years. Any commitment by a member institution with respect to the televising or cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season. (B11-3-(aa))."

19. On June 7, 1981, at the annual meeting of the CFA held in Dallas, Texas, the membership of the CFA adopted a resolution providing in pertinent part:

> "1. That the members of the CFA do hereby reject the validity of the Official Interpretation of the NCAA Council dated April 18, 1981;
>
> "2. That, until further notice, the CFA membership reserves unto themselves the right to determine the best use of their property rights to broadcast, telecast and cablecast their institutional football contests;

"3. That the members of the CFA hereby authorize the CFA Board of Directors to develop forthwith a detailed plan for the telecasting and cablecasting of its members' institutional football contests and to make appropriate contacts with various programming entities for the purpose of investigating the saleability of the members' institutional football contests pursuant to such a plan. The Board of Directors shall submit recommendations with respect to those findings to the CFA membership for its approval at a meeting called as soon as feasible."

20. The CFA notified the NCAA that until further notice it did not have the right to determine the use of the CFA members' property rights to broadcast, telecast, or cablecast their institutional football contests.

21. Despite the above action taken by the CFA on behalf of the members of the class, the NCAA, without authority, represented to the three major television networks and others that it had the authority with respect to the 1982 and subsequent football seasons to contract for the telecasting of collegiate football games of all members of the NCAA, including those of the plaintiffs and the other members of the class.

22. Thereafter, the CFA once again notified the NCAA and each of the three major television networks of the CFA membership's rejection of the Official Interpretation and informed said networks that the NCAA did not have authority to negotiate an agreement on behalf of the members of the CFA.

23. On or about August 8, 1981, the CFA and the National Broadcasting Company, Inc. ("NBC") reached an agreement for the telecasting of college football games of CFA member institutions for the 1982, 1983, 1984, and 1985 football seasons (the "Agreement"). Over the term of the Agreement, CFA members would receive compensation aggregating no less than One Hundred Eighty Million Dollars ($180,000,000.00). The Agreement has additional substantial advantages for CFA members as compared with previous and current football

television agreements negotiated by the NCAA purportedly on behalf of its members, including the opportunity for more frequent exposure of CFA schools on national television, and the unique opportunity—which the NCAA has steadfastly refused to obtain for its members—of exposure on prime time national television.

24. The Agreement was subject to ratification by the CFA membership on or before August 31, 1981.

25. On August 21, 1981, the CFA held a special meeting of its membership at which the membership ratified the Agreement between CFA and NBC.

26. By reason of this ratification, each member of the CFA is bound by the terms of the Agreement unless by September 10, 1981, it notified the CFA of its desire not to be bound.

27. Pursuant to the Agreement, if not all CFA members elect to be bound by the Agreement, NBC has the option of terminating the Agreement.

28. Prior to the meeting on August 21, 1981, and thereafter and continuing to the present time, the NCAA through its Executive Director and other officers, agents, and employees, has asserted to plaintiffs and other class members that the Agreement is a violation of the terms and conditions of membership in the NCAA and that any CFA member ratifying the Agreement or electing to be bound thereby would be subject to disciplinary actions and sanctions under the NCAA Constitution and Bylaws, including suspension or expulsion from the NCAA.

29. During the same time period the NCAA through its Executive Director and other officers, agents, and employees, has made and cause to be made statements to class members, the news media and others that any CFA member ratifying the agreement or electing to be bound thereby would be referred to the NCAA Committee on Infractions, and thence to the NCAA Council, for disciplinary action, including suspension or expulsion from membership in the NCAA.

30. The purpose of the statements referred to in paragraphs 28 and 29 was to induce CFA members not to ratify the Agreement (and, following ratification, to induce CFA members to elect not to be bound by the Agreement) in order to maintain the NCAA's purported perpetual position as exclusive bargaining agent for its members with respect to sale of television rights for intercollegiate football.

FIRST CLAIM: ILLEGAL RESTRAINT OF TRADE

31. Plaintiffs repeat and reallege paragraphs 1 through 30 hereof.

32. The NCAA was originally established to further a number of lawful objectives of its member institutions, including promotion of amateurism in college sports and sponsorship of intercollegiate sporting events and championship tournaments. In addition, the member institutions of the NCAA, including the plaintiffs and the members of the class they represent, have at various times in the past delegated to the NCAA the purely commercial function of negotiating for the sale of the right to telecast the member institutions' college football events. This delegation was made solely to promote the economic self-interest and for the convenience of the member institutions, and each such delegation was effective solely for the limited period of time involved in the contract in question. Exerting complete control over the sale of the rights to telecast college football events (whether or not authorized by the Constitution or Bylaws of the NCAA) is not essential to the furtherance of any lawful objective of the NCAA, nor any objective that it was formed to promote.

33. The plaintiffs and the members of the class they represent have chosen to appoint the CFA as their bargaining agent for the sale of the rights to telecast college football events for the 1982 and subsequent football seasons. In order to continue the monopoly of the NCAA in the negotiation and

sale of the rights to telecast college football events in the United States, the NCAA, its officers, agents, and member institutions have conspired to restrain and prevent the plaintiffs and the members of the class they represent from negotiating and selling the telecasting rights to football events through any means other than the NCAA, in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

34. In furtherance of the foregoing conspiracy, the NCAA has coerced, threatened and intimidated the plaintiffs and the members of the class they represent both individually, and collectively through the media, with disciplinary sanctions, including suspension or expulsion if they do not continue to negotiate and sell the rights to telecast their football events through the NCAA. Such expulsion would deny the plaintiffs and the members of the class they represent, *inter alia,* access to the right to participate in NCAA-sanctioned events and would result in their suffering irreparable injury as set forth with greater particularity at paragraphs 50 and 51 hereafter.

SECOND CLAIM: MONOPOLIZATION AND ATTEMPT TO MONOPOLIZE

35. Plaintiffs repeat and reallege paragraphs 1 through 30 and 31 through 34 hereof.

36. Prior to 1981, the NCAA had obtained control over 100% of the market for the negotiation and sale of telecasting rights to college football events in the United States.

37. Prior to the formation of the CFA, the NCAA for many years had, through the choice of its members, been the sole entity that negotiated and sold telecasting rights to regular season college football events in the United States. Plaintiffs and the other class members they represent utilized the NCAA as their agent for the sale of their telecasting rights to further their own economic self-interest and out of convenience. The CFA has attempted to break up this monopoly currently

enjoyed by the NCAA by offering colleges and universities a competitive alternative for the sale of the right to telecast their football events.

38. Beginning on or before January 1, 1981, the NCAA has engaged in an attempt to monopolize, a conspiracy to monopolize, and monopolization of the negotiation and sale of telecasting rights to college football events in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2). In furtherance of the foregoing attempts to monopolize, conspiracy to monopolize, and monopolization of negotiation and sale of telecasting rights to regular season college football events in the United States, the NCAA has attempted to coerce and restrain the plaintiffs and the class members they represent, by threatening the members of the CFA individually, and collectively, through the news media, with disciplinary sanctions including suspension and expulsion from membership in the NCAA if the plaintiffs and the members of the class they represent do not continue to negotiate and sell telecasting rights to their college football events exclusively through the NCAA.

39. Continued membership in the NCAA is essential to the plaintiffs and members of the class they represent for the reasons set forth in paragraph 6 herein.

40. If the NCAA is not enjoined from continuing its unlawful coercion, the NCAA will continue in its monopoly position in the sale of television rights to college football events, and the plaintiffs and the members of the class they represent will suffer irreparable injury as set forth with greater particularity at paragraphs 50 and 51 hereafter.

THIRD CLAIM: CONDUCT ULTRA VIRES THE NCAA

41. Plaintiffs repeat and reallege paragraphs 1 through 30, 31 through 34, and 35 through 40 hereof.

42. Plaintiffs and members of the class assert that the NCAA governing documents do not grant the NCAA control

over the rights of the member institutions to telecast football games.

43. The so-called Official Interpretation of the NCAA states that the NCAA has exclusive control of the telecasting rights to college football games. This interpretation is *ultra* vires as an exercise of power not delegated to the NCAA by the plaintiffs and the members of the class in that it purports to empower the NCAA with control of all forms of televising intercollegiate football games, it purports to allow for a vote of the membership on the terms of the control by mail ballot, which is in violation of the procedures adopted by the NCAA, and it purports to empower the NCAA with control of both the televising and *cablecasting* of football games in future seasons. It is further invalid as an attempt to enact legislation for NCAA members without complying with the procedures required by Article 2, Section 1(h) and Article 6, Sections 1 and 4 of the NCAA Constitution.

44. Defendant NCAA claims that a member institution must acquiesce in the position of the NCAA, announced in the Official Interpretation, that the control by the NCAA over the telecasting rights is a term and condition of membership of the NCAA, and failure to acquiesce in this position is a basis for disciplinary action or sanctions by the defendant.

45. The plaintiffs and the members of the class state that the control over telecasting rights is not and never has been a term and condition of membership of the NCAA and that the failure to acquiesce in that control is not a basis for disciplinary action or sanctions by defendant.

46. Because certain controversies have arisen between plaintiffs and defendant concerning the legal rights of the parties to control the telecasting of college football games, the terms and conditions of membership of the NCAA, and the ability of the NCAA to institute disciplinary sanctions with respect to this issue, a declaration of rights of the parties is

sought in order to terminate this controversy before one of the parties suffers irreparable damage for which there is no adequate remedy at law.

FOURTH CLAIM: TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

47. Plaintiffs repeat and reallege paragraphs 1 through 30, 31 through 34, and 35 through 40 herein.

48. The NCAA's willful and malicious tactics of threats, coercion, and intimidation are intended to and, unless enjoined, will have the effect of interfering with the consummation of the Agreement, all without legal justification or excuse.

49. Said interference will result in immediately, permanent, and irreparable injury to the plaintiffs and the class they represent, as set forth in paragraphs 50 and 51 herein.

IRREPARABLE INJURY

50. If the NCAA's program of threats, coercion, and intimidation against CFA members succeeds in inducing a substantial number of CFA members to elect not to be bound by the Agreement and NBC accordingly exercises its option to terminate the Agreement, the plaintiffs and the class they represent will be immediately, permanently, and irreparably injured, *inter alia,* as follows:

a) They will lose the opportunity to direct attention to their programs—academic as well as athletic—through increased exposure of their institution on national television—including the unique opportunity for substantial prime time exposure.

b) They will lose the economic benefits of the Agreement, which are in the aggregate of such magnitude that the NCAA will not be able to respond in treble damages.

51. Further, if the NCAA carries out its threats and suspends or expels the CFA members from membership in the NCAA, or otherwise disciplines the plaintiffs and the members of the class, the plaintiffs and the class they represent will be unable to participate effectively in intercollegiate athletics, post-season football bowl competition, and NCAA championship tournaments (including the NCAA Basketball Tournament) and will thereby suffer immediate and permanent injury that is incapable of measurement in damages, including, among other things:

a) loss of prestige through participation in popular sports, post-season football bowls, and championship tournaments;

b) loss of an important element of the institution's entire educational program.

WHEREFORE, plaintiffs, on their behalf and on behalf of the members of the class, demand judgment against the NCAA as follows:

1. To enjoin preliminarily and permanently the NCAA, its officers, agents and employees from prohibiting any member institution from assigning or otherwise exercising its rights concerning the telecasting of college football games.

2. To enjoin preliminarily and permanently the NCAA, its officers, agents and employees from stating, threatening, or otherwise suggesting that an institution so assigning or exercising its rights other than through the NCAA is subject to disciplinary action or sanctions from the NCAA.

3. To enjoin preliminarily and permanently the NCAA, its officers, agents and employees from implementing any disciplinary action or sanctions against the plaintiffs or members of the class on the basis of the dispute over the telecasting of college football games.

4. To enjoin preliminarily and permanently the NCAA from continuing and retaining its monopolistic position as the exclusive agent or entity providing a service for the sale of telecasting rights of college football games.

5. To declare that:

(a) The acts of the NCAA are in violation of Sections 1 and 2 of the Sherman Act.

(b) The telecasting of college football games is a property right of the institutions participating in the game.

(c) The telecasting of college football games is an institutional property right that may be assigned by the institution to any entity.

(d) The NCAA, after the 1981 football season, has no right to control the telecasting of the football games of the plaintiffs and members of the class.

(e) It is not a term and condition of membership of the NCAA to acquiesce and grant control of an institution's telecasting rights to college football games to the NCAA.

(f) The NCAA may not institute disciplinary action against plaintiffs or members of the class because plaintiffs and the class have not assigned control over the telecasting rights to college football games to the NCAA.

6. For reasonable attorney's fees and costs of court.

7. For such other and further relief as the Court deems just and proper.

DATED: Norman, Oklahoma; September 8, 1981.

/s/ Stanley M. Ward
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ATTORNEY FOR PLAINTIFFS

(Caption omitted in printing.)

ANSWER OF DEFENDANT THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
(Filed October 20, 1981)

COMES NOW defendant, The National Collegiate Athletic Association, and for its Answer to the Complaint:

FIRST DEFENSE

1. STATES that the Complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

2. STATES that the plaintiffs lack standing or capacity to sue.

THIRD DEFENSE

3. STATES that the plaintiffs are not the real parties in interest.

FOURTH DEFENSE

4. STATES that the venue is improper in that the defendant is an unincorporated association which does not reside in this district, is not incorporated in this district, is not transacting or doing business in this district, is not licensed to do business in this district, does not have an agent in this district, and may not be found in this district.

FIFTH DEFENSE

5. STATES that the plaintiffs have failed to join parties under Rule 19, Fed.R.Civ.P., to wit, the American Broadcasting Companies, Inc., ABC Sports, Inc. and CBS, Inc., although plaintiffs seek to enjoin and prevent the defendant from entering into contracts and/or performing contracts with the

American Broadcasting Companies, Inc., ABC Sports, Inc., and CBS, Inc.; said parties have a direct and substantial interest relating to the subject matter of this action and are so situated that the disposition of this action in their absence may as a practical matter impair or impede their ability to protect that interest and may also leave the defendant subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest; said parties are indispensable parties to this action; a judgment rendered in the absence of said parties would be prejudicial to them and to the defendant; the Court cannot, by protective provisions in the judgment, by the shaping of relief, or by other measures lessen or avoid prejudice to such parties or to the defendant; and a judgment rendered in the absence of such parties will be inadequate.

SIXTH DEFENSE

6. STATES that this action is brought prematurely.

SEVENTH DEFENSE

7. STATES that the plaintiffs have failed to exhaust remedies within the defendant voluntary association.

EIGHTH DEFENSE

8. STATES that the Court should abstain from litigating this matter since it is not at this time a proper subject for judicial intervention.

NINTH DEFENSE

9. STATES that the plaintiffs are foreclosed from invoking the jurisdiction of the Court to grant equitable relief because the plaintiffs are guilty of laches in not having timely brought the

claims, issues and questions asserted and raised in their petition herein before the defendant voluntary association for determination in accordance with the Constitution, By-laws and other governing legislation of the defendant voluntary unincorporated association.

TENTH DEFENSE

10. STATES that no justiciable controversy exists in this case.

ELEVENTH DEFENSE

11. In response to paragraph 1 of the Complaint, ADMITS that the plaintiffs bring this action pursuant to the statutory provisions and common law therein cited and request the relief mentioned herein; but DENIES that this action may be maintained pursuant to said statutes or the common law; DENIES that the plaintiffs are entitled to any relief mentioned therein; and DENIES each and every allegation, averment and conclusion contained in paragraph 1 of the Complaint which has not been hereinabove specifically and expressly admitted.

12. DENIES the allegations contained in paragraph 2 of the Complaint.

13. In response to paragraph 3 of the Complaint, STATES that the defendant has sold television broadcast rights to certain intercollegiate championship football games sponsored by the defendant; STATES that the plaintiffs, or their related institutions, have sold television broadcast rights to certain intercollegiate football games; and DENIES each and every allegation, averment and conclusion contained in paragraph 3 of the Complaint which has not been hereinabove specifically and expressly admitted.

14. In response to paragraph 4 of the Complaint, STATES that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations concerning

the legal standing and capacity of the plaintiff, The Board of Regents of the University of Oklahoma, or whether said plaintiff is a member of the College Football Association, and, therefore, DENIES the allegations and conclusions concerning that matter; and DENIES that The Board of Regents of the University of Oklahoma is a member of the defendant.

15. In response to paragraph 5 of the Complaint, STATES that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations and conclusions concerning the incorporation, legal standing and capacity of plaintiff The University of Georgia Athletic Association, or whether The University of Georgia Athletic Association is a member of the College Football Association, and, therefore, DENIES the allegations and conclusions concerning those matters; and DENIES that The University of Georgia Athletic Association is a member of the defendant.

16. In response to paragraph 6 of the Complaint, STATES that the defendant is a voluntary unincorporated association of certain colleges, universities, and allied members, some of which are members of the College Football Association; STATES that the defendant provides rules for the conduct of varsity intercollegiate athletic competitions in more than twenty sports, including football, basketball, baseball, hockey, lacrosse and soccer, and sponsors national championships in certain sports; and DENIES each and every allegation, averment and conclusion contained in paragraph 6 of the Complaint which has not been hereinabove specifically and expressly admitted.

17. ADMITS the allegations contained in the first sentence of paragraph 7 of the Complaint; but STATES that it is without knowledge or information sufficient to enable it to form a belief as to the truth of the allegations contained in the second sentence of paragraph 7 of the Complaint and, therefore, DENIES the same.

18. In response to paragraph 8 of the Complaint, STATES that the College Football Association is an allied member of the defendant and that certain members of the College Football Association are members of the defendant; STATES that is it without knowledge or information sufficient to enable it to form a belief as to whether the plaintiffs are members of the College Football Association; and DENIES each and every allegation, averment and conclusion contained in paragraph 8 of the Complaint which has not been hereinabove specifically and expressly admitted.

19. In response to paragraph 9 of the Complaint, ADMITS that the plaintiffs purport to bring this action as a class action pursuant to Rule 23, Fed.R.Civ.P., and that the plaintiffs purport to define the class as all member institutions of the College Football Association; and DENIES each and every allegation, averment and conclusion contained in paragraph 9 of the Complaint which has not been hereinabove specifically and expressly admitted.

20. DENIES the allegations contained in paragraphs 10 and 11 of the Complaint.

21. In response to paragraph 12 of the Complaint, ADMITS that the College Football Association and certain members of the College Football Association are members of the defendant; but DENIES each and every allegation, averment and conclusion contained in paragraph 12 of the Complaint which has not been hereinabove specifically and expressly admitted.

22. In response to paragraph 13 of the Complaint, STATES that in 1977 the defendant contracted with the American Broadcasting Companies, Inc., and ABC Sports, Inc. for the telecasting of a series of college football games during the 1978 through 1981 college football seasons; and DENIES each and every allegation, averment and conclusion contained in paragraph 13 of the Complaint which has not been hereinabove specifically and expressly admitted.

23. In response to paragraph 14 of the Complaint, STATES that due to the fact that the contract covered only the telecasting of football games through the 1981 college football season, the defendant began preliminary discussions with the major networks for the telecasting of football games for 1982 and subsequent college football seasons; and DENIES each and every allegation, averment and conclusion contained in paragraph 14 of the Complaint which has not been hereinabove specifically and expressly admitted.

24. In response to paragraph 15 of the Complaint, STATES that the College Football Association explored with various television networks the feasibility of entering into a contract for the telecasting of college football games separate and apart from any contract that might be negotiated by the defendant; and DENIES each and every allegation, averment and conclusion contained in paragraph 15 of the Complaint which has not been hereinabove specifically and expressly admitted.

25. In response to paragraph 16 of the Complaint, STATES that the Constitution and By-laws of the NCAA, among other things, so provide, and further STATES that the Constitution and By-laws of the defendant are not so limited.

26. ADMITS the allegations contained in paragraph 17 of the Complaint.

27. In response to paragraph 18 of the Complaint, STATES that, on or about April 18, 1981, defendant issued an Official Interpretation of By-law 11-3(aa) which provides in substance as quoted in paragraph 18 of the Complaint; and DENIES each and every allegation, averment and conclusion contained in paragraph 18 of the Complaint which has not been hereinabove specifically and expressly admitted.

28. ADMITS the allegations contained in paragraph 19 of the Complaint.

29. In response to paragraph 20 of the Complaint, STATES that the College Football Association notified the defendant to the effect summarized in paragraph 20 of the Complaint; but DENIES the substance of the notice summarized in paragraph 20 of the Complaint.

30. DENIES the allegations, averments and conclusions contained in paragraph 21 of the Complaint.

31. In response to paragraph 22 of the Complaint, STATES that th College Football Association notified the defendant to the effect summarized in paragraph 22 of the Complaint; but DENIES the substance of such notice.

32. In response to paragraph 23 of the Complaint, STATES that on or about August 8, 1981, the College Football Association and the National Broadcasting Company, Inc. reached an agreement relating to the telecasting of college football games of College Football Association member institutions for the 1982, 1983, 1984 and 1985 football seasons; and DENIES each and every allegation, averment and conclusion contained in paragraph 23 of the Complaint which has not been hereinabove specifically and expressly admitted.

33. On information and belief, ADMITS the allegations contained in paragraphs 24 and 25 of the Complaint.

34. DENIES the allegations and conclusions contained in paragraph 26 of the Complaint.

35. On information and belief, ADMITS that the allegations contained in paragraph 27 of the Complaint.

36. In response to paragraph 28 of the Complaint, STATES that prior to the meeting of August 21, 1981, and thereafter, the defendant, its executive director, and certain other officers agents and employees, advised certain members of the College Football Association that the agreement between the College Football Association and the National Broadcasting Company, Inc., if and when binding upon an active

member of the defendant, would constitute a violation of the terms and conditions of said member's membership in the defendant, that any member of the College Football Association which was a member of the defendant and which elected to become bound by such agreement would be subject to disciplinary actions and potential sanctions in accordance with the provisions and procedures of the NCAA Constitution, By-laws and other governing legislation of the defendant, and that such sanctions could include suspension or expulsion from the defendant; and DENIES each and every allegation, averment and conclusion contained in paragraph 28 of the Complaint which has not been hereinabove specifically and expressly admitted.

37. In response to paragraph 29 of the Complaint, STATES that the defendant, its executive director and other officers, agents and employees made statements to members of the College Football Association, the news media and others, to the effect summarized in the preceding paragraph of this Answer; and DENIES each and every allegation, averment and conclusion contained in paragraph 29 of the Complaint which has not been hereinabove specifically and expressly admitted.

38. DENIES the allegations, averments and conclusions contained in paragraph 30 of the Complaint.

39. In response to paragraph 31 of the Complaint, incorporates herein by reference its foregoing responses to paragraphs 1 through 30 of the Complaint.

40. In response to paragraph 32 of the Complaint, ADMITS that the defendant originally was established for the purposes, among others, summarized in the first sentence of paragraph 32 of the Complaint; STATES that the member institutions of the defendant have authorized the defendant to negotiate with television networks for the telecast of series of college football games of member institutions of defendant, pursuant to the Constitution, By-laws and other governing

legislation of the defendant; and DENIES each and every allegation, averment and conclusion contained in paragraph 32 of the Complaint which has not been hereinabove specifically and expressly admitted.

41. In response to paragraph 33 of the Complaint, STATES on information and belief that certain members of the College Football Association have chosen to appoint the College Football Association as a bargaining agent for the sale of the rights to telecast college football games for the 1982 and subsequent college football seasons; and DENIES each and every allegation, averment and conclusion contained in paragraph 33 of the Complaint which has not been hereinabove specifically and expressly admitted.

42. In response to paragraph 34 of the Complaint, STATES that any institution expelled from the defendant would not be eligible to participate in championship events conducted and sponsored by the defendant; and DENIES each and every allegation, averment and conclusion contained in paragraph 34 of the Complaint which has not been hereinabove specifically and expressly admitted.

43. In response to paragraph 35 of the Complaint, defendant incorporates by reference its foregoing responses to paragraphs 1 through 34 of the Complaint.

44. DENIES each and every allegation, averment and conclusion contained in paragraphs 36, 37, 38, 39 and 40 of the Complaint.

45. In response to paragraph 41 of the Complaint, incorporates by reference its foregoing responses to paragraphs 1 through 40 of the Complaint.

46. In response to paragraph 42 of the Complaint, STATES that the plaintiffs may so assert; but DENIES that the defendant's governing Constitution, By-laws and other governing legislation do not grant to the defendant control over the manner in which the member institutions of the defendant

exercise their rights to telecast regular season college football games; and DENIES each and every allegation, averment and conclusion contained in paragraph 42 of the Complaint which has not been hereinabove specifically and expressly admitted.

47. In response to paragraph 43 of the Complaint, STATES that the substance of the Official Interpretation referred to in the first sentence of paragraph 43 of the Complaint is set forth in paragraph 18 of the Complaint; and DENIES each and every allegation, averment and conclusion contained in paragraph 43 of the Complaint which has not been hereinabove specifically and expressly admitted.

48. In response to paragraph 44 of the Complaint, STATES that the defendant claims that a member institution must comply with the Official Interpretation (that control of defendant over the television rights to regular season college football games of its members is a term and condition of membership in the defendant), until such time as the Official Interpretation may be determined by the membership of the defendant, at a convention of the members, to not be binding, and that failure of a member to comply with the Official Interpretation is a basis for disciplinary action or sanctions in accordance with the governing legislation of the defendant; and DENIES each and every allegation, averment and conclusion contained in paragraph 44 of the Complaint which has not been hereinabove specifically and expressly admitted.

49. In response to paragraph 45 of the Complaint, ADMITS that the plaintiffs so state; but DENIES the substance of the plaintiffs' statement; and DENIES each and every allegation, averment and conclusion contained in paragraph 45 of the Complaint which has not been hereinabove specifically and expressly admitted.

50. In response to paragraph 46 of the Complaint, ADMITS that the plaintiffs are seeking a declaration of rights of the parties; and DENIES each and every allegation, aver-

ment and conclusion contained in paragraph 46 of the Complaint which has not been hereinabove specifically and expressly admitted.

51. In response to paragraph 47 of the Complaint, incorporates by reference its foregoing responses to paragraphs 1 through 40 of the Complaint.

53. DENIES each and every allegation, averment and conclusion contained in paragraphs 48 and 49 of the Complaint.

54. DENIES each and every allegation, averment and conclusion contained in paragraphs 50 and 51 of the Complaint.

55. DENIES each and every allegation, averment and conclusion contained in the Complaint which has not been hereinabove specifically and expressly admitted.

56. DENIES that the plaintiffs are entitled to the relief demanded.

TWELFTH DEFENSE

57. STATES that the plaintiffs have waived and are estopped to assert the claims made in this action, and have ratified the actions of the defendant.

THIRTEENTH DEFENSE

58. STATES that the plaintiffs have no authority to institute and maintain this action.

FOURTEENTH DEFENSE

59. STATES that the plaintiffs are not entitled to equitable or other relief based upon the principles of *in pari delicto*, and are barred from maintaining this action by the doctrine of unclean hands.

FIFTEENTH DEFENSE

60. STATES that the plaintiffs' action, if any, accrued more than the period of time provided by all applicable Statutes of Limitations next preceding the filing of this action, and is barred by all applicable Statutes of Limitations.

WHEREFORE, the defendant prays that plaintiffs' Complaint and action be dismissed with prejudice and that defendant recover its costs.

FELLERS, SNIDER, BLANKENSHIP,
BAILEY & TIPPENS

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(Certificate of mailing omitted in printing.)

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JOINT STATEMENT OF UNCONTESTED FACTS
(Filed April 5, 1982)

Pursuant to the instructions of this Court at the Pretrial Conference held March 12, 1981, the parties submit the following uncontested facts:

1. Plaintiff, the Board of Regents of the University of Oklahoma, is the governing body of the University of Oklahoma. It is responsible for all of the operations of the University, including its intercollegiate athletic program. The University of Oklahoma is a member in good standing of the defendant National Collegiate Athletic Association.

2. Plaintiff, the University of Georgia Athletic Association, is a nonprofit corporation, organized and existing under the laws of the State of Georgia. The University of Georgia delegated to the University of Georgia Athletic Association the responsibility of operating and maintaining its intercollegiate athletic program by resolution of its Board of Regents. The University of Georgia is a member in good standing of the National Collegiate Athletic Association.

3. Defendant NCAA is a private, self-regulatory, nonprofit association organized in 1905. It consists of over 900 members. Membership is open to four year institutions with acceptable academic standards and conferences, associations and other groups related to intercollegiate athletics. Any member may withdraw at any time. If any member institution withdrew or was expelled from the NCAA, its athletes could not compete in NCAA championships in sports such as baseball, basketball, track, swimming, wrestling, gymnastics, etc.

4. The Constitution, Bylaws, Executive Regulations and Official Interpretations are published in a printed Manual and up-dated in the NCAA News. These publications are widely disseminated to all personnel involved on behalf of the members.

5. NCAA has a professional staff located at its headquarters in Mission, Kansas. There are about 80 employees reporting to the Executive Director, Walter Byers. There are several assistant executive directors including Thomas C. Hansen who is in charge of communications which includes the television contracts for football.

6. NCAA institutional membership is separated into divisions. Division I consists of 276 colleges with major athletic programs (but only 187 play football). Divisions II and III include 500 colleges with less extensive athletic programs. Several years ago, Division I was restructured to create Divisions I-A and I-AA for football.

7. The NCAA regular season television controls are limited to football, and do not extend to basketball, baseball and other intercollegiate sports.

8. There will be no contest as to the contents of a number of official documents of the NCAA, including the Constitution, By-Laws, Official Interpretations, Television Committee Reports, Television Plans and Principles, and contracts with TV networks and cable systems. The parties have quoted from or paraphrased different portions of these documents in their proposed findings of fact, but have not made any agreement as to which portions of the documents should be included in the court's findings or as to the appropriate wording in characterizing or paraphrasing the documents.

Respectfully submitted,

/s/ Clyde A. Muchmore
Andy Coats
Clyde A. Muchmore

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Margaret McMorrow-Love
ATTORNEYS FOR DEFENDANT

DEFENDANT'S EXHIBIT LT

1982-1985 NCAA FOOTBALL TELEVISION PLAN

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

1982-1985 NCAA FOOTBALL TELEVISION PLAN

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION
National Office
U.S. Highway 50 and Nall Avenue
P.O. Box 1906
Mission, Kansas 66201
913/384-3220

June 1982

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1982-85 NCAA
Football Television Plan

ARTICLE 1
Purposes of Plan

The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television (See Note 1) upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

ARTICLE 2
Periods of Plan Control; Administration

To accomplish the Plan's purposes, all forms of television of the football games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan. The Plan control periods shall be from September 1 through the second Saturday in December of each year covered by this Plan, which are the calendar years 1982, 1983, 1984 and 1985. The Plan shall be administered by the NCAA Football Television Committee (hereinafter referred to as the "committee") to the end that any such television programs presented during the Plan's control periods shall be in full accordance with all

---

Note 1: As used in this Plan, the terms television and televising shall include all types of television delivery systems, including, without limitation, conventional broadcasting, cablecasting and other television transmissions.

requirements of this Plan. Where reference is made hereafter to the two-year periods of the Plan, the first such period shall be 1982 and 1983, and the second shall be 1984 and 1985.

ARTICLE 3
Award of Rights

The committee has awarded to two qualified organizations (hereinafter referred to as "carrying networks") appropriate rights to negotiate and contract for the simultaneous telecasting of college football games of members of the NCAA and other stipulated programming during the Plan control periods pursuant to the terms of this Plan. The carrying networks each shall present a series of nationally released telecasts ("Football Series") over conventional network television broadcast facilities as provided herein.

The rights for the presentation of the Football Series telecasts prescribed above shall include the exclusive right to present a particular game on the series, even though exception telecasting or cablecasting rights to that game previously shall have been granted for release by another party under the provisions of Article 16 or the game had been selected for presentation on the Supplementary Series.

Other companies will televise a "Supplementary Series" of college football games of members of the NCAA and other stipulated programming as provided herein. Rights for the Supplementary Series have been awarded by the committee for the 1982 and 1983 Plan control periods.

The basic provisions governing the "Supplementary Series" shall be contained in Article 23, but each provision of this Plan shall apply to that series unless clearly not applicable.

The carrying networks and companies carrying the Supplementary Series also shall have the right to release for televising by the American Forces Radio and Television Network any program produced under rights hereby granted.

Contracts

Contracts with each carrying network for all rights awarded with respect to the Football Series shall be signed on behalf of the NCAA by the Association's executive director with the approval of the committee and shall be subject to the approval of the NCAA Council. Each such rights contract shall specify the guaranteed minimum aggregate compensation to be paid by the carrying network to all participating colleges with which it contracts for each season and shall provide that the carrying network shall freely negotiate and contract individually and directly with member colleges for appearances under such terms and conditions and for such compensation as may be agreed upon, consistent with and subject to the conditions specified in the Plan.

One or more similar contracts shall be executed in a like manner on behalf of the NCAA for the Supplementary Series.

Station Agreement

The stations composing the series networks shall be required to abide by the provisions of this Plan in presenting the series telecasts and shall not broadcast any unscheduled commercial or other announcement during such program. If infractions occur, they may result in withdrawal of the right of a station or system to telecast the remainder of the series.

ARTICLE 4
Coverage Rights and Requirements

Each carrying network shall have the rights to simultaneously telecast the series programs throughout the world in any area in which simultaneous telecasting is possible. Additionally, such rights shall include the right to telecast such exposures on a delayed basis in Hawaii and Alaska within

seven (7) days following the game, provided such a telecast shall not conflict with any high school game.

Each carrying network shall offer complete nationwide simultaneous coverage of the series games for each exposure presented by it. The states of Alaska and Hawaii may be excluded by agreement of the carrying network and the committee.

The rights granted to the carrying networks shall include the right to telecast each series program on a delayed basis in those areas of the United States in which simultaneous transmission is not possible, as long as release is made as soon as reasonably possible following the game.

The rights granted to each carrying network and company shall include the right to use excerpts of its game telecasts of any length on a delayed basis anywhere in the world in any news or sports program within 48 hours of the conclusion of the game, and thereafter excerpts of two minutes or less for newscasts, promotional purposes and anthologies produced by the network.

During the telecasting of a Football Series exposure, whenever a carrying network is divided, it may telecast into one region live or delayed reports of other games it is televising that day, provided there is no extension of the originally scheduled time period without committee approval. Such reports also may be utilized in the postgame show. Similarly, the networks and companies may present a game report including live or delayed action of not to exceed two minutes in length from a game not being televised on the Football Series by that network or company. It is intended that such a report be of a game of unusual interest on that date. Approval for such an insert must be obtained from the committee.

The television rights to be acquired by a carrying network from the NCAA's members may include the right to telecast, cablecast or otherwise exhibit, or sublicense the right to so

exhibit, anywhere in the world except in the United States, its territories or possessions, the games included in its 14' exposures, or any part or parts thereof, by any and all means of delayed visual communication, including delayed telecasting and cablecasting, by use of videotape, cassette cartridge, videodisc, record, film or otherwise, provided that, if the network acquires such rights, it shall pay to the participating NCAA members royalties of not less than 55 percent of the gross receipts derived from the use of the rights described in this paragraph, less expenses. Expenses shall include only costs in connection with preparation, dubbing, subtitling, converting, packing and shipping any film or tape of the coverage; foreign taxes levied upon or arising in connection with the use of such rights; the cost of any raw stock, and residuals or other fees not exceeding scale which may be claimed by writers, talent or other persons who were involved in the original production or telecasting. The foregoing matters shall be subject to express agreement in each instance in the individual game contract to be negotiated between the network and the host participating institution.

The television rights to be acquired by a carrying network from the NCAA's members also may include the right to exhibit in the United States, its territories or possessions, the games included in its 14 exposures, or any part or parts thereof, by such means of delayed visual communication as videotape, cassette cartridge, videodisc, record, film or otherwise, but excluding all forms of telecasting and cablecasting except to the extent used for projections in flight, on shipboard or for nontheatrical exhibition, provided, however, that if the network acquires such rights, it shall pay to the participating NCAA members royalties of not less than 55 percent of the gross receipts derived directly or indirectly from the use of the rights in this paragraph described less "expenses." Expenses shall include only costs in connection with preparation, dubbing, subtitling, converting, packing and shipping any film or tape of

the coverage; taxes levied upon or arising in connection with the use of such rights; the cost of any raw stock, and residuals or other fees not exceeding scale which may be claimed by writers, talent or other persons who were involved in the original production or telecasting. The foregoing shall be subject to express agreement in each instance in the individual game contract to be negotiated between the network and the host participating institution.

In a foreign television market in which either carrying network makes simultaneous release of NCAA football telecasts, it shall be permissible for the host institution to authorize the release of a delayed telecast or cablecast of its own coverage of a football game not earlier than four hours subsequent to the scheduled starting time of the latest live telecast of any NCAA football game which either carrying network has scheduled in that market on that date. Further, the delayed telecast or cablecast may not begin earlier than one-half hour after the start of the game to be delayed telecast or cablecast. Authorization for such a telecast or cablecast must be obtained from the NCAA Football Television Committee on a specific game-by-game basis. In a foreign market where simultaneous release of the series is not made, such delayed telecasts or cablecasts may be made at any time authorized by the committee.

ARTICLE 5
Dates of the Series

The NCAA shall offer for sponsored telecasting by the carrying networks during each of the regular football seasons covered by this Plan two series of college football programs to take place on the 13 Saturdays following the first Saturday in September, on the Friday afternoon following Thanksgiving each year and on such other dates approved by the committee as shall be necessary to achieve the exposures, game telecasts

and team appearances required by this Plan. Night game telecasts may be authorized by the committee (See Note 2).

ARTICLE 6
Sunday Television

There shall be no simultaneous televising of collegiate football games on Sundays unless specifically approved by the committee.

ARTICLE 7
Series Format

During each season of the Plan, each carrying network shall be required to present 14 "exposures" (i.e., the release on a single date of a live game telecast into each television market on the national network) of football games played by NCAA members, utilizing for these presentations the dates identified in Article 5. A Saturday afternoon exposure shall be available each week to each network. It shall not be a requirement that each network televise a game or games each of the 13 weeks of the series, but at least one such telecast shall be required each week.

Within its 14 exposures, each carrying network shall present each season a minimum of 70 team appearances (i.e., a team appearance is one team's participation in one televised game). The 70 team appearances shall be achieved by presentation of a combination of either seven national exposures and seven regional exposures (three to six games per exposure) or eight national exposures and six regional ex-

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Note 2: A "night game" shall be any game which begins at 7 p.m. or later in the most easterly time zone in which it is simultaneously televised. This definition also shall apply as appropriate in determining when a "night game" telecast may be released under the provisions of Article 16.

posures. The occasions on which a regional or national exposure shall be presented by a carrying network shall be determined by that network as long as consistent with this Plan. Any change in the stated ratio of national and regional exposures shall be subject to approval by the committee, and such approval shall not be withheld unreasonably.

For one of its exposures each year, each carrying network shall have the option of presenting two seminational telecasts, with each telecast released to approximately 50 percent of the nation's homes. Each college appearing in such a telecast shall be charged a national appearance, as provided in Article 13. In such a case, the carrying network consequently may present one fewer regional game telecast that season.

In presenting these exposures each year, the carrying networks may utilize double-header presentations (i.e., two games telecast into each television market on a national network, the second telecast immediately following the first game telecast) on any date within the control period authorized for telecasting by the Plan or the committee.

On the first Saturday in December of each year, it shall be permissible for two Division I series exposures to be presented in addition to the telecasts of the semifinal games of the National Collegiate Division II Football Championship and the Division III national championship game.

The second Saturday in December of each year shall be reserved for national television release of the combined coverage of the championship game of the National Collegiate Division II Football Championship and the semifinal games of the National Collegiate Division I-AA Football Championship, and the third Saturday in December of each year shall be reserved for the national telecast of the championship game of the National Collegiate Division I-AA Championship.

No such Division I-AA, II or III championship presentation shall count toward the team appearances required by the

second paragraph of this article. Further, the appearance rules of Articles 12 and 13 shall not apply.

Weeknight telecasts (Monday through Thursday) may be approved on an individual basis by the committee. Friday night telecasts from the first Friday in September through the Friday following Thanksgiving will not be approved (See Note 2). If a double-header is scheduled for Thanksgiving Day, the second telecast thereof may be a night game.

Selection of the dates to be used in these various ways shall be the responsibility of each carrying network, subject to the provisions of Article 10 of this Plan.

Regional Divisions

Each game of a regionally televised exposure shall be telecast into the areas of natural interest of the participating institutions and their traditional rivals, as nearly as practicable, with the sum of the regional areas providing complete national coverage.

For any exposure which is to consist of regional coverage, the carrying network shall present for committee approval a map of the United States indicating suggested regions of release in accordance with the above stated requirements for regional coverage. When institutions with overlapping areas of interest appear in different telecasts at the same time, the committee and the network will establish network divisions which, insofar as possible, serve the best interests of all parties.

The release of any regional telecast shall be confined to not more than 65 percent of the television households in the 48 states. Once during each two-year period of the 1982-1983 and 1984-1985 NCAA football seasons, each carrying network may request the Football Television Committee to approve a regional release pattern in which one of the regional games will be televised in an area comprising up to 75 percent of the

television households in the 48 contiguous states. Further, when special circumstances warrant, a carrying network may devise a regional release pattern deviating from the committee's general policy of requiring coverage throughout the conference area of each team participating in a regional telecast, subject to the committee's approval, which shall not be unreasonably withheld.

For regional telecasts during the month of September for which the participating teams are selected by May 15, the maps are to be presented no later than June 1. For subsequent weeks of the series, the maps are to be received by the committee for consideration no later than 11:30 a.m. (NYT) of the fifth day prior to the dates of the contests to be regionally televised.

Once the regions have been approved for an exposure, no change may be made in the regional alignments unless new information directly affecting the regional patterns is submitted by the carrying network and the change is approved by the committee.

Change of Coverage

A carrying network may change coverage from a one-sided game to a more competitive game during presentation of regional telecasts. Such coverage shall not be changed until after completion of the half-time program and then only in a game in which the point differential is 18 points or more. Even for such a game, it shall not be changed in the home television area of either of the participants. These areas shall be determined in each such case by the committee or its designated representative. Each network may change coverage in this manner no more than once per season for any team.

Replacement of Lost Telecast

If cancellation of a scheduled game is necessary, every effort shall be made by the carrying network and the committee to present a replacement game on the same date or at a later date. The committee and the provisions of the NCAA contract with the network which govern actions to be taken as a result of loss of a telecast will determine the conditions under which the replacement game shall be televised.

Should transmission of a game be lost, the network may utilize all or portions of the taped telecast of an earlier game as a programming replacement to fill that time period; however, the provisions of the preceding paragraph shall apply.

ARTICLE 8
Times of Presentations

On those Saturdays when a double-header is scheduled, the pregame telecast of the first game shall begin at 12 noon, Eastern Time, and the kickoff shall occur between 12:20 and 12:35 p.m. The pregame telecast of the second game shall begin at 3:30 p.m., Eastern Time, and the kickoff shall occur between 3:45 and 3:50 p.m. At the request of a carrying network, the committee may adjust those times to further the interests of the program, subject to the provisions of the Ground Rules which limit overlaps of game telecasts. On those dates on which only one network televises, it shall determine the telecast starting time, subject to the approval of the committee.

When a network is presenting the early (12:35 p.m., Eastern Time, kickoff) exposure of a double-header, for a regional telecast which will be released in the Pacific Time Zone only it shall be permissible for the network to schedule the kickoff at either 9:35 a.m. or 3:45 p.m., Pacific Time, even

though the remainder of the regional exposure shall be released with kickoffs at 12:35 p.m., Eastern Time. If it believes it would benefit the series, the committee may authorize such a Pacific Time Zone release for kickoff at 12:45 p.m., Pacific Time, even though it would thereby be competing with the late (3:45 p.m., Eastern Time) telecast of the other network. It is understood that if a game to be televised with a kickoff at 12:45 or 3:45 p.m., Pacific Time, is played in another time zone, it also would be televised concurrently in its immediate area of interest. The committee will monitor Pacific Time Zone presentations to determine whether the members of any conference receive an excessive number of appearances due to this provision on one or both networks and may prohibit selection by such network(s) of additional regional appearances confined to the Pacific Time Zone for such group of teams.

(NOTE: The times in the above paragraph are representative of the permissible time spans for kickoffs set forth in the first paragraph of this Article.)

Scheduled overlaps between the two network telecasts will be permitted only after consultation with each network and only in special circumstances [e.g., situations where inadequate lighting makes it impossible to start the second game of the day (televised by the second network) at a late enough hour to assure that overlap will be avoided], dates when prominent baseball games will be televised or on the Friday following Thanksgiving Day. Subject to each network's obligation to present 14 exposures, neither network shall be required to televise concurrently with a telecast of a baseball league championship playoff or World Series game. The committee may authorize concurrent telecasts of series games on dates when such baseball games are televised.

ARTICLE 9
Prohibition of Blackouts

The televising of a Football Series game or Supplementary Series game shall not be blacked out in the area in which the game is played.

ARTICLE 10
Selection and Announcement of Network Schedules and Scheduling Ground Rules

Each carrying network shall be completely responsible for selecting the Football Series games it will televise during each year of the Plan, and neither the committee nor its members shall attempt to influence these selections. Such selections, however, shall be subject to certification by the committee as to adherence to the provisions of this Plan.

Each carrying network shall inform the committee immediately of any schedule selection; and, if certified by the committee, the selection shall be considered to be a firm commitment to the participating host institution subject to contractual agreement. The announcement of any selection(s) by either carrying network shall have the prior approval of the committee. Such announcements shall be coordinated by the committee and the carrying network to serve the best interests of the participating NCAA member institutions and the series.

Ground Rules

The annual schedule of the games of member colleges to be presented by each carrying network shall be selected by it according to the Ground Rules set forth in the rights contracts with the carrying networks which are controlling and which, for convenience, are summarized as follows:

1. The NCAA Football Television Committee (or a subcommittee of the Football Television Committee) shall adjudi-

cate the scheduling process in accordance with these Ground Rules and other provisions of the NCAA Football Television Plan.

2. It shall be the goal of the NCAA Football Television Committee that the two series of 14 exposures as carried by the two contracting television networks shall be as equal and balanced as possible. The committee shall retain the right to reject any selection which, in its judgment, would have the effect of injuring or restricting the scheduling opportunities of the other network contrary to the goals of these Ground Rules and the Plan. At the conclusion of the process set forth in Ground Rules Nos. 5 and 6, the committee may reverse for that season the order of selection described in No. 7 if, in its opinion, the selections to that point have resulted in one of the carrying networks being significantly disadvantaged compared with the other network as to the attractiveness and ratings potential of its schedule.

   During the four years of the Plan, the committee reserves the right, after separate consultation with each of the networks, to make modifications in the selection process herein deemed necessary for the benefit of the series.

3. There shall be no restriction on communications between each of the two carrying networks and NCAA member institutions.

4. The network first selecting a game on a date shall control the time sequence of the presentations on that date if a double-header is scheduled.

5. Not later than March 1 each year, the committee shall ascertain the preferences of each of the networks for a minimum of three "special dates" per network on which each network shall present telecasts during that season; and the committee shall endeavor to resolve any con-

flict(s). Any unresolved conflicts remaining shall be resolved by a draft (started by a flip of a coin) whereby each network selects its remaining special dates.

To initiate the drafting process, a coin shall be flipped to determine which network shall have the right of first selection in 1982. Thereafter, the networks shall alternate selections until the minimum three special dates have been picked for each network. The 1982 network also shall have first selection in 1985 at whatever phase of the selection process an initial choice is made. The other carrying network shall have rights of first selection in 1983 and 1984.

In each such case, the network shall select a specific special date, a specific game or games and a specific time of day at which it shall present the selected game(s). The selection of a specific game may occur at any time until Monday of the week of the game; but, if selection of the game(s) for a special date is delayed until control dates are selected, the move of a game from another date can only be made from a date the network controls. In no such case, however, shall selection of a special date constitute control of any game on that date until the end of the equity draft phase (paragraph 6 of this Article) if such a draft occurs or until selection of a specific game, which selection can only be made from the remaining unselected games on that special date, whichever first occurs.

The "special dates" are: the initial Saturday of the series each year; Thanksgiving; the Friday and Saturday following Thanksgiving; the first Saturday in December; Labor Day; Veterans Day; with the approval of the committee, weeknights, Monday through Thursday, and any Saturday night.

Each network may be authorized to televise on the same special date; but head-to-head scheduling or overlaps will

not be authorized thereon, except as provided in Article 8 and except if both networks select the Friday following Thanksgiving, then an afternoon exposure shall be available to each network on that Friday and, in such case, minimum overlap may be scheduled during the period from 2:45 p.m., Eastern Time, to the conclusion of the first telecast, which shall start at the normal time for an early exposure of a double-header (12:20 to 12:35 p.m., Eastern Time).

6. Once the foregoing scheduling has been completed, the committee shall call a meeting of the two networks between March 15 and May 15, at which time each network shall select two games (hereafter called "equity games") to be telecast during that year's football season. The objective shall be to establish an equitable foundation of games chosen by each network for its schedule. The number of "equity games" to be selected at that time may be increased or decreased upon the separate agreement of each of the two networks and approval of the committee.

   The network which had the second selection of special dates shall select first in the equity draft. The two networks then shall alternate selections until the equity games have been selected. These selections shall be subject to confirmation by the committee as in the best interests of the membership and the stated purposes of this Plan.

7. Immediately thereafter, the two networks shall choose through alternating selections the remaining dates of the series on which one or the other will have "control"; i.e., first right of selection of game(s), authority to adjust game times to meet the provisions of Ground Rule 8 and the option of moving per Ground Rule 10.

   The network which had the last selection of equity games shall have first selection of a date to be controlled from the

remaining series dates, and, thereafter, the selection of the remaining dates shall alternate between networks. Games to be presented on these dates shall be picked on a weekly basis not later than 11:30 a.m. (NYT) on the Monday of the week in which the game is to be played.

As with all other scheduling selections, choice of these games shall be subject to the approval of the committee as consistent with the purposes of the Plan and the endeavor to achieve a balanced program for the two networks.

8. By May 15, if the selections made at this point have not provided one (or both) of the networks with two games in early September, if so directed by the committee, it shall select an additional game or games on a September date on which it has control in order to have early season promotional opportunities.

9. On a date on which it has first right of selection, a network may elect to present its game(s) early or late, or in prime time (if approved by the committee), regionally or nationally. Game times may be adjusted as required. The second network will utilize the remaining time slot, if each network is televising on that date, and may present a regional or national exposure, at its option.

   If the network which controls the date (Network A) elects to present a regional telecast and Network B elects to present a national telecast, then Network A shall select one regional game first, Network B shall select its national game second and Network A then shall complete its regional selections.

   If Network B elects to present a regional exposure, then the networks shall alternate selection of games, with Network A making selections 1-3-5-7 and Network B selections 2-4-6-8.

10. A network (Network A) may move any game from any date on which it has first selection rights to another date in order to strengthen its overall schedule. In such a case, Network B, which was to pick second on the date from which the game was moved, then has selection priority for that date as specified in Paragraph 9 and controls the time; Network A then has second selection priority for the date.

    If a network which is to select second on a date wishes to move a game from that date to another date which it controls, it may do so at the time of its selection turn on the initial date. The right of next selection on the initial date then reverts to the network which had first selection rights.

ARTICLE 11
Availability to Other Carriers

Each network carrying the Football Series and company carrying the Supplementary Series each year shall make all programs available on a reasonable basis proposed by it and approved by the committee to any other network or individual station or system which may wish to carry such games simultaneously, provided that from or additions to the series presentations, or present any unscheduled commercial or other announcements during the series presentations.

ARTICLE 12
Appearance Requirements

The carrying networks shall include in the Football Series the following required appearances by member institutions:

(a) Each carrying network shall be required to schedule in each two-year period of the Plan games in which at least 82 different NCAA member institutions appear. It is the Football Television Committee's goal that at least 115 different institutions appear on the two networks' schedules

in two years. If, after the first season, it appears the two-year total will not reach 115, the committee shall request the networks to attempt to schedule additional teams during the second year which did not participate during the first year.

(b) The institutions which are members of Division I-AA Football (See Note 3) shall receive minimum aggregate team appearances of .286 times the number of members in Division I-AA as a part of the regular series telecasts during each two-year period of this Plan. Of these guaranteed team appearances, two shall be allocated to the members of each Division I-AA allied conference during each such two-year period. Each carrying network shall be required to present a minimum of 50 percent of this minimum aggregate number of appearances.

In addition to such minimum aggregate team appearances, the games of the Division I-AA Football Championship shall be covered each year as required in Article 22.

If a I-AA conference has one or more members classified in Division I-A, an appearance by such a I-A institution would count against both the conference guarantee and the overall I-AA guarantee. Credit would not accrue against either of the I-AA guarantees if two I-A members of such a conference appeared. If a conference member classified in Division I-AA were televised playing a nonconference opponent classified I-A, no credit against either I-AA requirement would be granted for the appearance by the nonconference institution.

Note 3: For the purposes of the administration of the Plan for the seasons of 1982 and 1983, particularly insofar as meeting the requirements of Article 12, a college will occupy the membership classification in the sport of football which it held on September 2, 1982. The current football classification of each football-playing member institution may be found in the NCAA Directory.

ARTICLE 13
Appearance Limitations

During each of the two-year periods covered by this Plan, each member institution shall be eligible to appear on the Football Series of the two networks six times, these six appearances to be divided equally between the two carrying networks. Within the six appearances, each such member shall be eligible to appear on four national and two regional telecasts in each two-year period, these four national and two regional appearances to be divided equally between the two carrying networks. Any appearance opportunity not utilized for a national telecast may be used in a regional telecast. Also, no member may appear on the Football Series more than four times during the first year of each two-year period of this Plan (twice on each network), nor more than five times during each such second year.

It shall be permissible for the two carrying networks to exchange appearance opportunities for respective colleges. Each such exchange must be approved by the committee.

Participation in any telecast approved under the provisions of Article 16 (a), (c) or (d) or of Article 18 shall not be subject to an appearance charge under this article, but participation in a telecast approved under the provisions of Article 16 (b) shall result in a charge for a regional appearance in accordance with the terms of that provision.

Disciplinary Actions

The NCAA Committee on Infractions or Council, acting in accordance with the Association's rules and procedures, periodically may disqualify various member institutions from any appearance on the Football Series and the Supplementary Series telecasts and in related programs of live presentations described in this Plan. Such an action, however, shall not

require cancellation of an existing firm commitment (as defined in Article 10) between a network or company and an institution.

An institution thus disqualified may not be a party to a tentative or firm commitment or private understanding or agreement for an appearance on any of the series until after the sanctions have been removed by the NCAA Committee on Infractions or Council, except it may be selected on a Monday for an appearance on the following Saturday if its period of probation is to terminate during the four-day interim and the carrying network or company receives authorization for such a selection from the committee prior to contacting such an institution.

Such an institution, however, may appear on a closed circuit telecast released only on the campus of its opponent institution, but it may not receive any compensation for such a closed circuit telecast.

ARTICLE 14
Member Institution Game Contracts and Consent of Opponents

Subject to this Plan, each member institution shall contract for its own television appearance(s) during each period covered by this Plan. No member institution shall be obligated to televise any of its games, home or away. No member institution may make any arrangements for live or delayed television in any form authorized by this Plan of any football game without the prior consent of its opponent institution.

ARTICLE 15
Standards of Presentation

Only sponsors approved by the Football Television Committee may be utilized for any football game or other program televised pursuant to the 1982-1985 Plan.

Those sponsors approved shall be organizations of high standards whose products and advertising are consistent with the promotion of college football and presenting it as an integral part of higher education.

Approved sponsors shall not include advertisers of the following: alcoholic beverages (except malt beverages, beer and wine as limited below), cigarettes, professional sports organizations or personnel (except as specified hereafter) and any advertising which portrays or otherwise directly promotes gambling. Advertisements shall be prohibited which contain references to or photographs of the games, personnel (except as specified hereafter), broadcasts, telecasts or other activities of professional sports organizations. No advertisement may relate the advertiser or the advertised product to any institution or athlete involved in the game or program, or to the NCAA, unless prior written approval has been granted by the executive director of the NCAA.

NCAA policy excludes advertisements featuring active professional football athletes. The network shall inform each of its advertising sponsors of this policy and the importance thereof to the NCAA. If any such sponsor determines nevertheless to advertise contrary to said policy, the network will inform the NCAA of that fact and will use every reasonable effort to avoid any repetition of that action by such sponsor. Advertisements featuring active professional athletes in other sports shall be permitted. Participating institutions are requested to not permit cigarette advertising in their stadia during the telecast of any series game.

The NCAA intends the restrictions in this Article to apply to advertisements presented by local stations during station breaks in such telecasts. Each network shall inform its affiliated stations carrying such telecasts of such restrictions; and, should the network observe infractions of these restrictions by such

affiliated stations, it shall take appropriate action to remedy these infractions immediately with the station or stations involved. Failure to comply by such stations shall not in and of itself constitute a breach of this contract by the carrying network.

Beverage Advertising Restrictions

Sponsors advertising malt beverages, beer or wine are approved on a limited basis in game telecasts, pregame shows and postgame shows. In each pregame show, three such 30-second commercials and, in each postgame show originating from the site of a game, two such 30-second commercials may be presented. There shall be no limitation with respect to such commercials in postgame shows originating from the network's studio or other location clearly not at the site of the televised game.

There shall be within each game telecast, a maximum of nine such 30-second commercials; one within positions one to three, one within positions four to six, one within positions seven to nine, one within positions 10 to 11, one within positions 12 to 14, one within positions 15 to 17, one within positions 18 to 20, one within positions 21 to 23 and one within positions 24 to 25 (as such positions are set forth in the Commercial Format set forth in this Article). There shall be no more than 270 seconds of commercial time for such sponsors permissible in the aforesaid nine allowable positions during each game.

In any other show televised under the provisions of the 1982-1985 Plan, sponsors advertising malt beverages, beer or wine are approved for a maximum of three 30-second commercials during each 30-minute period.

Commercial Format

In each exposure, there shall be not more than 26 commercial minutes presented in 25 commercial periods, 22 of not more than 60 seconds each and one of 30 seconds, one of 120 seconds and one of not more than 90 seconds, and not more than two station breaks of no more than 63 seconds each, in each series game telecast.

The commercial periods, which shall be of 60-seconds duration unless otherwise specified, shall be distributed in accordance with this format:

Start of Game Telecast

(1) Commercial (30 seconds or 60 seconds)**
(2) Commercial

Start of First Quarter

(3) Commercial
(4) Commercial
(5) Commercial
(6) Commercial

End of First Quarter

(7) 2 Commercials (60 plus 60)

Start of Second Quarter

(8) Commercial
(9) Commercial
(10) Commercial
(11) Commercial

End of Second Quarter

Half Time
Station break (63 seconds)‡
(12) Commercial*
(13) 2 Commercials (60 plus 30)

Notes

* 30 seconds of this time may run adjacent to commercial position No. 2.

** Commercial positions Nos. 1 and 25 are to total 90 seconds. Duration of each to be network's option.

‡ If the policy of the carrying network concerning the length of station breaks changes from 63 seconds, the Football Television Committee will consider the change and will approve it if reasonable.

Start of Third Quarter

(14) Commercial
(15) Commercial
(16) Commercial
(17) Commercial

End of Third Quarter

(18) Commercial
Station break (63 seconds)‡

Start of Fourth Quarter

(19) Commercial
(20) Commercial
(21) Commercial
(22) Commercial

End of Fourth Quarter

(23) Commercial†
(24) Commercial†
(25) Commercial (30 seconds or 60 seconds)**†

End of Game Telecast

("Commercial" means an interval for presentation of commercials by the carrying network.)

Notes

** Commercial positions Nos. 1 and 25 are to total 90 seconds. Duration of each to be network's option.

† Commercial No. 25 may not be inserted into fourth quarter. Commercial positions Nos. 23 and 24 may be inserted into the fourth quarter if position No. 23 is preceded by a natural timeout used for game commentary, and if there are sufficient natural times out thereafter to accommodate them. In addition, if the length of the game telecast will exceed three hours and five minutes, measured from the beginning of that portion of the telecast containing Commercial No. 1, then, following another natural timeout used for game commentary, an additional 60 seconds of commercial time may be used during the fourth quarter within a natural timeout following a score (touchdown, field goal or safety). Malt beverage, beer or wine advertising may be used in this commercial position.

‡ If the policy of the carrying network concerning the length of station breaks changes from 63 seconds, the Football Television Committee will consider the change and will approve it if reasonable.

Make-Up Commercials

The carrying network may make up an omitted commercial subject to these provisions:

(a) No more than two make-up commercials may be inserted in any single telecast, either from earlier in that telecast or from a preceding series telecast.

(b) A commercial missed early in a series telecast may be inserted later in that same telecast whenever an extra natural timeout occurs or during half time.

(c) A commercial missed in one series telecast may be inserted in a later series telecast whenever an extra natural timeout occurs or during half time.

These provisions shall cover a commercial scheduled for position 25 omitted by reason of the carrying network's conforming with the prime time access rule of the Federal Communications Commission.

Liaison Official

For each telecast, the agency which assigns officials for the host institution shall appoint a Liaison Official, who shall serve as coordinator between the producer and field officials in assuming observance of the commercial format described in Article 15. His functions shall be prescribed by the committee in a pamphlet which shall be made available to each game official, liaison official and assigning agency, and to the head football coach and director of athletics of each Division I member institution.

The Liaison Official shall have sole authority to call or extend timeouts for use by the carrying network for insertion of commercial messages according to the format herein, although the referee retains ultimate control of the administration of the game. The Liaison Official shall not agree to any special format

or deviation from the regular format or procedures for any game. One of his primary goals shall be the presentation of the necessary commercials without affecting the flow of the game.

The carrying network shall provide the Liaison Official with a telephone headset over which he can communicate with the producer of the telecast, and he is to wear the headset and be in direct personal contact with the producer throughout the game. The network shall provide a cable handler to assist the Liaison Official if requested to do so.

The Liaison Official will be reimbursed for his fee and expenses by the carrying network through his assigning agency.

News Presentation

During the half time of the second game of a double-header presentation of series telecasts, the carrying network may allocate not more than five minutes to the presentation of news or sports news by the network's news department or by its respective affiliated stations; but in no such case may commercial time or promotional material be presented which would exceed that provided for in this Plan.

Promotional Announcements by Network

To avoid distractions from game telecasts, the carrying network shall utilize good taste and judgment in restricting the number of announcements it uses on series telecasts to promote other programs or the series itself. During the period from the beginning of the pregame show to the conclusion of the game telecast, the carrying network shall be limited in the promotion of any and all other shows or events, including series telecasts, to the same amount of time per telecast which is allocated herein to the NCAA and the participating colleges for promotional messages.

The committee expects the support of each carrying network in furthering the demarcation between collegiate and professional sports activities. In that regard, the carrying network may present during each telecast of the series not in excess of two promotional announcements for professional football telecasts by the carrying network. Any such announcement shall not exceed 15 seconds in length, shall be of a billboard nature only and shall not include any action excerpts of any professional game. Only one such announcement may be presented in each half of a telecast. It may be aired adjacent to a commercial presentation.

ARTICLE 16
Exception Telecasts and Cablecasts of Division 1 Games

Under the terms and conditions of this Article, a Division I member institution (or its Division II or III opponent institution) may obtain approval for a live "telecast" or "cablecast" (as defined in Note 7), or both, of one or more of its games not selected by either of the carrying networks for presentation pursuant to this Plan. Games may be approved as "Sellout Exceptions," "400-Mile Exceptions" or "Other Exceptions" as defined in the subsequent sections of this Article. Authorization for such a telecast or cablecast must be requested and received by the member from the committee (via the appropriate district representative). Any such privilege granted hereunder, however, shall apply exclusively to the station(s) and/or system(s) specified in the member's application and must be limited by the applicant institution to such station(s) and system(s).

Application by the institution for authorization for the exception telecast or cablecast must be received by the district representative on the committee as much in advance as possible for a sell-out exception and not later than 15 days prior to the date of the telecast for a 400-mile exception. The committee requests that institutions which anticipate a sell-out complete

the procedure for authorization for such a telecast or cablecast, which then would be subject to the sell-out actually being achieved.

References to mileage in this Article shall mean air miles.

Any transmission or retransmission outside the permissible area of reception for an exception telecast or cablecast (even though the committee determines it occurred despite the efforts of the institution to follow the Plan) shall be a violation of the terms of this Plan. If the applicant institution did not exercise its best efforts to limit the area of reception to the permissible area, as specified herein, or there is evidence the institution was unable to control the area of reception of the exception telecast or cablecast, the applicant shall be charged with a regional appearance as defined in Articles 7 and 13 of the Plan; and/or its subsequent application(s) for an exception telecast(s) or cablecast(s) shall be denied. If the institution has received its maximum regional appearances for the current two-year period of this Plan, the appearance shall be charged against it when it next will be eligible for a regional appearance.

Despite the foregoing, the committee shall have the authority to waive the 120-mile limitation on the permissible area of reception for a 400-mile exception telecast of a game played in Hawaii with a kickoff at 7:30 p.m. or later (Hawaiian time), provided the beginning of the telecast follows by a minimum of three hours the kickoff of any network Football Series telecast to be released that day in the market of the exception telecast. The telecast must meet all other provisions of this article. Further, the signal may be retransmitted only in the same manner as the signal of the carrying station normally is transmitted. No special arrangements for extended retransmission of the game telecast would be permitted. Use of a super station or other means of communication which would send the signal into a wider pattern of distribution than that normally covered by a single television station or cable system will not be authorized. (Such committee authorization shall be subject to approval by the two carrying networks in each instance.)

Permissible Areas of Reception of Cablecasts and Retransmissions of Exception Telecasts by Cable Systems

The permissible area of reception of a cablecast shall be a 120-mile radius from the designated center of any television market in which the cablecast is authorized.

The permissible area of reception of a retransmission of an exception telecast by a cable television system, microwave, translator or any other means whatsoever shall be a 120-mile radius from the designated center of the television market in which the telecast is authorized.

Designated Center of a Television Market

The applicant institution shall designate the center of the television market in which authorization is sought for release of an exception telecast or cablecast. The designated center shall be a point (identified by city and street address) which is the approximate geographical center of the locations of the broadcast television transmitters serving the television market. The designated center of a television market shall be subject to approval or revision by the Football Television Committee.

Sellout and 400-Mile Exceptions

(a) On the afternoons and evenings of the Saturdays during the Plan control periods and on Thanksgiving Day, among the types of exception telecasts and cablecasts which may be presented are Sellout and 400-Mile Exceptions.

(1) A game which is a sellout may be telecast over one station or cablecast over one or more systems in the home television market (See Note 6) of the home institution, telecast over one station or cablecast over one or more systems in the home television market of the visiting institution, and telecast over one station or

cablecast over one or more systems in the television market of the site of the game if it is not played in the home community or television market of either competing institution, provided in each case that no appreciable damage (See Note 4) will be done to any conflicting game (See Note 5).

For a game to qualify for sellout status, tickets no longer shall be available for sale 48 hours prior to game time; and the game must be classified as a sellout by the committee. In making such a determination, the committee shall consider only the sale of stadium seats, not the sale of tickets for areas of the stadium where seats are not available.

If both participants have the same home television market (See Note 6), the host institution may choose an alternative market for its presentation, provided that there will be no appreciable damage to a conflicting game; or it may agree to allow the visiting institution to do so. Such alternative market must contain a population which has demonstrated prior interest in the televising institution's program and must be approved by the committee.

(2) A game which is played at least 400 air miles from the visiting team's campus may be telecast over one station or cablecast over one or more systems in the visiting team's home television market only, if no appreciable damage will be done to a conflicting game (See Note 5).

Other Exceptions

(b) On Saturday nights, Friday nights, Saturday afternoons not utilized for series telecasts and holidays other than any Thanksgiving Day utilized for a series telecast, a game may be telecast by a maximum of four stations and/or cablecast by designated systems in four markets located within the NCAA district or districts represented by the participating institutions, but only if no appreciable damage will be done to any conflicting game. On Friday nights, no appreciable damage may be done to any conflicting game, or any junior college or high school game which would be deemed a conflicting game if it involved college teams (See Note 5). An appearance on such a telecast or cablecast will be charged as a regional appearance under the rules set forth in Article 13 to each institution in whose television market area(s) the telecast was released.

Authorization for such a telecast or cablecast must be received from the committee. Authorization will not be granted at night if the telecast would conflict with a network Football Series telecast.

(c) On the afternoons of Thanksgiving Day and the Saturdays on which series telecasts are scheduled, a game between two Division I institutions which have not appeared on a series telecast during the eight preceding years and the current season, or between such a Division I institution and a Division II or III institution, may be telecast by a maximum of five stations and/or cablecast by designated systems in five markets, without regard for appreciable damage to any other game(s). A participant in such a telecast or cablecast will not be charged with an appearance under Article 13. However, no member institution may participate in more than two such telecasts or cablecasts each season.

Authorization for such a telecast or cablecast must be received from the committee.

(d) On Friday nights and Saturday nights, a game between two Division I institutions which have not appeared on a series telecast during the eight preceding seasons and the current season, or between such a Division I institution and a Division II or III institution, may be telecast by a maximum of five stations and/or cablecast by designated systems in five markets, provided no appreciable damage will be done to any conflicting game, or any junior college or high school game which would be deemed a conflicting game if it involved college teams, on Friday night or to any conflicting game on Saturday night (See Note 5). A participant in such a telecast or cablecast will not be charged with an appearance under Article 13.

Authorization for such a telecast or cablecast must be received from the committee.

The committee shall have the right to withhold or withdraw authorization for an exception telecast or cablecast under any of the provisions of this Article if another television system threatens enlargement of the permissible area(s) of reception.

Rights of Networks

Authorization for any exception telecast or cablecast described in this Article will be issued in each instance only with the understanding that the carrying network which has control of the date on which the exception telecast or cablecast is to be aired (as such control is established in Article 10) shall have a first right to negotiate with the applicant institution for presentation of the exception telecast or cablecast on a live basis in the approved market(s). The other carrying network shall have a second nonexclusive right of negotiation.

The duration of such first right to negotiate shall be a reasonable time determined by the applicant institution but shall constitute, at a minimum, a period of five business days from the time of initial notification from the committee to the network that the committee has authorized the exception telecast or cablecast, unless the application is received by the district representative less than 14 days prior to the date of the game to be televised, in which case the committee may authorize a negotiating period of a shorter duration.

An institution desiring to present an exception telecast or cablecast shall first seek authorization from the committee via application on the appropriate form to its district representative (for a presentation under the provisions of this Article). If the telecast or cablecast is authorized, the committee will notify the network which controls the date on which it will be presented and the second network. The control network then will initiate contact with the institution to negotiate for rights to the game. Such negotiation may be conducted on the network's behalf by its affiliated station in the institution's home television market.

The second network may not contact the institution or undertake negotiations with it until the negotiating period of the control network has passed, or the control network has negotiated for five business days with the institution, whichever is earlier. Thereafter, it may seek rights to the exception telecast under the provisions of this Plan, provided that the applicant institution also may negotiate with the control network and the televising entity named in the institution's application during such negotiations.

If a series game is to be presented on that date, the exception game telecast or cablecast by the carrying network's designee must be presented in full on a live basis as an addition to or a replacement for the series game telecast in the market(s) approved for the exception telecast or cablecast. Further, the presentation by the carrying network (or its designee) must comply with the terms of the Plan.

The appropriate carrying network retains the right to present such a game on the series, exclusively, subject to contractual agreement with the host institution, even if exception telecasting or cablecasting rights to the game previously had been granted to others.

In contrast, the company carrying the Supplementary Series does not enjoy such exclusive rights. Refer to Article 23 for the provisions of the Plan governing presentation of a game both as an exception telecast and as a Supplementary Series telecast.

Subsequent to applying to the committee for authorization to present an exception telecast or cablecast, an applicant institution retains the option of cancelling its plans until such time as it signs an agreement for the exception telecast or cablecast. Thereafter, the institution is committed to presentation of the telecast or cablecast.

Subject to the aforesaid rights of prior first negotiation and the right of a network to select the game for a series telecast, the applicant institution shall be free to make its own arrangements for telecasting or cablecasting the game under the exception television terms of this Plan.

Delaying Series Telecast

If a carrying network contracts to present an exception telecast and to show it at the time designated for the live presentation by it of a regular series game, the series game may be telecast on a delayed basis in the affected station area(s) immediately after the showing of the exception telecast. Such delayed telecast of the series game, however, may not be made if it would do appreciable damage (See Note 4) to any conflicting game (See Note 5). It also may be delayed to 10:30 p.m., local time, on the date on which the game is played.

Standards of Presentation

The provisions of Article 15 shall apply to sponsors of any telecast or cablecast authorized in this Article.

Note 4: "Appreciable damage" shall be deemed to be created by the existence of a "conflicting game" within:

(a) A 120-mile radius from the designated center of the television market in which release of an exception telecast originated by a VHF broadcast transmitter is being considered; or

(b) A 45-mile radius from the designated center of the television market in which release of an exception telecast originated by a UHF broadcast transmitter is being considered; or

(c) A 120-mile radius from the designated center of the television market in which release of an exception telecast originated by a VHF transmitter for receipt on a subscription basis only is being considered; or

(d) A 45-mile radius from the designated center of the television market in which release of an exception telecast originated by a UHF transmitter for receipt on a subscription basis only is being considered, or within 30 miles of more than 1,000 subscribers (or a subscribing nonresidential facility permitting gatherings of more than 500 viewers) of the subscription broadcast television transmitter; or

(e) 30 miles of more than 1,000 subscribers in the aggregate (or a cable-connected or subscribing nonresidential facility permitting gatherings of more than 500 viewers) of one or more cable system(s) which is (are) being considered for origination or retransmission of an exception cablecast or telecast. If any portion of a cable system is located within 30 miles of a conflicting game, all subscribers of that cable system shall be deemed to be located within 30 miles of the conflicting game unless the applicant institution can demonstrate to the Football Television Committee the number of subscribers of that cable system which are located within 30 miles of the conflicting game.

Accordingly, the Football Television Committee will not authorize an exception telecast originated by a UHF broadcast transmitter if any conflicting game is scheduled between the 45- and 120-mile radii, unless the institution can prevent any cable retransmission which would be deemed to create appreciable damage under the provisions of subparagraph (e) immediately above.

When making a determination of the existence of appreciable damage, the committee will base its findings strictly on the presence or absence of a conflicting game within the applicable area and will not accept declarations of lack of attendance damage by the institutions participating in a conflicting game.

Note 5: A "conflicting game" is any nontelevised college football game for which admission is charged, which is not sold out, which is played within the prescribed area (See Note 4) and which is not started at least three hours before the beginning of the televised game or is started within three hours after the beginning of the televised game.

Note 6: "Home television market," as used in this Plan, shall be the home community of a member institution unless that community has no television station, or has only one television station and the member can demonstrate to the satisfaction of the committee it is unable to obtain adequate coverage or fair compensation from the station in its community. In such instances, an institution may petition the committee for authorization to identify another community as its home television market. Once its home market is identified with the approval of the committee, the institution may not change to a second market for purposes of presenting an exception telecast or cablecast during the same football season and may change home markets thereafter only for good reason and upon approval by the committee. The home television market under any circumstance must be the market acceptable to the committee in closest proximity to the institution and within the accepted area of interest of the institution's athletic program.

Note 7: "Telecast," as used in the Plan, means a television presentation originated by a television broadcast station and transmitted by conventional television broadcast for reception and viewing by the public at large with conventional television receivers not requiring special equipment; means a television presentation originated by a subscription broadcast television station (or other transmitter except one utilized in connection with a cable television system) and transmitted to viewers by a system which, by means of a scrambled broadcast signal or otherwise, limits reception to its subscribers, and includes retransmission of such broadcasts under the provisions of this Plan by television stations, cable television systems, translators or other means.

"Cablecast," as used in this Plan means a television presentation originated by or for a cable system and transmitted to viewers by a system which, by means of cable distribution (or otherwise), limits reception to its subscribers.

A satellite transmission which results in direct reception by viewers of an authorized exception telecast or cablecast, unless such direct reception is authorized by the committee, shall constitute a violation of the provisions of this Article and may result in the applicant institution being charged with a regional telecast of its subsequent application(s) for exception telecast(s) being denied.

ARTICLE 17
Exception Telecasts and Cablecasts of Divisions II and III Games

In any year embraced by this Plan, an exception telecast or cablecast of a game between any two institutions which are members of Division II or III (See Note 3) may be presented under the following regulations:

(a) On the afternoons of Thanksgiving Day and the Saturdays on which series telecasts are scheduled, such a game may be televised or cablecast on a maximum of five stations and/or systems, without application of the appreciable damage rule (See Note 4) and without restriction on the television appearances by either participating institution.

(b) On Friday nights, Saturday nights, Saturday afternoons not utilized for series telecasts and holidays other than Thanksgiving Day, such a game may be televised or cablecast on a maximum of five stations and/or systems without restriction on the number of television appearances made by individual institutions participating, but only if no appreciable damage will be done to any conflicting game or, on Friday nights only, any junior college or high school game which would be deemed a conflicting game if it involved college teams (See Note 5).

A Division II or III institution qualified to televise or cablecast a game under the provisions above may petition the committee to extend its network of stations and/or systems if the game or associated ceremonies warrant. If the authorized total exceeds 10 outlets, then a carrying network controlling the date of the telecast shall have first right to negotiate and the other carrying network the second right to negotiate (as provided in Article 16) to present the telecast in each market.

In any of the above categories, authorization for such a telecast or cablecast must be requested and received from the committee. Any sponsors accepted must conform to the standards established by Article 15.

Telecasts and cablecasts authorized under the provisions of this Article shall be subject to the applicable provisions of Article 16, including without limitation those governing selection of the institution's home market, the permissible area of release and cable carriage.

The committee shall have the right to withhold or withdraw authorization for a special telecast or cablecast under the provisions of this Article if wired or cable systems threaten enlargement of the permissible area of reception.

ARTICLE 18
Educational Television

On any date controlled by this Plan, a game which is a sellout [in accordance with the definition in Article 16(a)] may be telecast or cablecast by the home institution's educational television station or system, provided this facility operates entirely on a noncommercial and nonprofit basis and reception is limited to the university community. Such a telecast may be made without reference to the number of television appearances permitted the participating institutions by Article 13. Approval in each case must be obtained from the committee, which may waive the appreciable damage rule (See Note 4) if potential harm to games of other institutions is not deemed significant.

An authorized telecast shall be limited to the one, originating institutional educational station. Its release may not be extended to any additional educational station or network.

Telecasts and cablecasts authorized under the provisions of this Article shall be subject to the same provisions governing the permissible area of reception and cable retransmission as specified in Article 16.

The committee shall have the right to withhold or withdraw authorization for presentation of a telecast or cablecast under the provisions of this Article if any means of retransmission threatens enlargement of the permissible area of reception.

ARTICLE 19
Closed Circuit Television

A closed circuit television presentation of a college football game may be authorized by the committee upon request of a member institution.

If presented on campus, primarily for the benefit of students and faculty, the television presentation will not be subject to the appreciable damage rule (See Note 4).

A closed circuit telecast also may be authorized for presentation in off-campus facilities in accordance with the off-campus rules listed below, except that a telecast to the closed meeting of a bona fide alumni or booster club need not observe the appreciable damage rule or the area of natural interest requirement. A reasonable admission may be charged either on- or off-campus. Any sponsors accepted must conform to the standards of Article 15.

Off-Campus Presentations

The following rules shall govern the off-campus presentations of live, simultaneous closed circuit television presentations of the games of NCAA member institutions:

For All Games:

1. When the appreciable damage rule is applicable pursuant to this Article to closed circuit telecasts, the test distance shall be a maximum of 45 miles (subject to reevaluation by the committee in special circumstances). In evaluating the request, the committee shall consider the capacity of the facility or facilities in which the television program will be presented in evaluating whether appreciable damage could be caused any conflicting game.

For Division I Games:

Upon application, a Division I college may obtain authorization for an off-campus closed circuit presentation provided:

1. No appreciable damage will be done to any conflicting game at any time and, on Friday night only, to any junior college or high school game which would be deemed a conflicting game if it involved college teams;

2. Release is limited to three off-campus facilities per institution which are located in no more than six different markets or areas. One of the six facilities must be in the home community or area of the applicant competing institution or its opponent (with the other five releases not to be permitted unless the closed circuit program is released on the campus or in the home area of the applicant competing institution); this criterion may be satisfied by telecasting or cablecasting the game in the home market of either

competing institution, in which case the closed circuit telecast may be presented in five other facilities. The two participating institutions may file a joint application;

3. Release is confined to areas of natural interest in the game to be shown.

For Division II or III Games:

Upon application, a Division II or III member institution may obtain authorization for an off-campus presentation, provided:

1. The number of off-campus release markets or areas is limited to five;
2. A reasonable effort is made to take the presentation to the campuses and/or home areas of the participating institutions, especially when the game is played at a neutral site;
3. For night games only: there is no appreciably damaging conflict with any college game on a Saturday, nor with any college, junior college or high school game on a Friday.

For Alumni Clubs:

A member institution may obtain authorization for an off-campus presentation to alumni clubs under the following conditions:

1. No more than six such releases of any game telecast may be authorized;
2. Each such release must be sponsored by a local alumni or booster group officially recognized by the applicant university or its opponent;
3. Although members of the group may bring guests to view the television program, and admission may be

charged to offset production and other expenses, the program may not be generally advertised to the public;

4. The committee could invoke the appreciable damage rule for other games if the size of the facility in which release is to be made or other circumstances warrant.

The committee shall have the right to withhold or withdraw authorization for a closed circuit television presentation under the provisions of this Article if retransmission by any means threatens enlargement of the areas of release which are permissible under the foregoing specifications.

ARTICLE 20
Delayed Telecasts or Cablecasts

Games played by member institutions may be delayed telecast and cablecast under the following regulations:

(a) A Saturday game may be presented at 10:30 p.m. or later on that Saturday, at 10:30 p.m. or later on any subsequent Friday or Saturday, at 10:30 p.m. or later on Thanksgiving Day and at any time on any other day;

(b) A Friday game may be presented at 10:30 p.m. or later on that Friday, at 10:30 p.m. or later on any subsequent Friday or Saturday, at 10:30 p.m. or later on Thanksgiving Day and at any time on any other day;

(c) A Thanksgiving Day game may be presented at 10:30 p.m. or later on that Thanksgiving Day, at 10:30 p.m. or later on any subsequent Friday or Saturday and at any time on any other day;

(d) A game other than those covered by items (a), (b) and (c) may be presented at 10:30 p.m. or later on any Friday or Saturday, at 10:30 p.m. or later

Thanksgiving Day and at any time on any other day, except that a game played on Sunday may not be presented prior to 10:30 p.m. of the date played;

(e) No telecast or cablecast presented under the provisions of paragraphs (a), (b), (c) or (d) of this Article may begin earlier than one-half hour after the beginning of the contest to be televised;

(f) If the applicable provisions of (a), (b), (c) and (d) are observed, game extracts of any length may be used at any time with the consent of the participating colleges in televised highlight presentations;

(g) Game extracts not to exceed two minutes in running time may be shown at any hour on any day within the framework of a general newscast or sports news telecast or cablecast, except each carrying network may present game extracts of longer duration from a series game telecast it carries on a network news or sports program, provided the program is telecast within 48 hours of the conclusion of the game.

However, no extracts of game action may be aired on a live basis at any time (other than by one of the carrying networks or as authorized by the Football Television Committee).

Any delayed presentation of game action material under this provision may not be made prior to the conclusion of that contest to be televised, except the material may be presented prior to the conclusion of that contest if each network series game to be televised on that date in that market has concluded prior to the beginning of the newscast. In other words, either the subject game or each of the network series games must have been concluded prior to presentation of the news material.

Approval of such delayed presentations need not be obtained from the committee.

All times mentioned in this Article shall be the current local time at each site of reception of the telecast or cablecast.

ARTICLE 21
Selection of Announcers

Each carrying network annually shall consult with the committee on the play-by-play announcers and color commentators the network plans to utilize for the series prior to their selection, which initial consultation shall in no case occur subsequent to April 1 of any year governed by this Plan. The final decision concerning any announcer shall be the carrying network's.

ARTICLE 22
Mandatory Supporting Programs and Other Requirements of Networks

In the interest of promoting intercollegiate athletics, the carrying networks shall be required to produce and televise the following each year as supporting programs of the series:

Divisions I-AA, II and III Championships, Appearances

(a) On the first Saturday in December, there shall be presented in the areas of natural interest of the participating institutions, and at the sites if the game(s) are sold out, coverage of the semifinal games of the National Collegiate Division II Football Championship and of the National Collegiate Division III Football Championship game, with the areas of release to be agreed upon by the respective carrying network and the committee.

"Areas of natural interest" shall mean the general geographic areas occupied by members of the competing institutions' conferences; or, if a competing institution is not a member of a conference, then the general geographical areas occupied by the competing institution's traditional rivals. The committee may agree to an area of release deviating from complete coverage of the areas of natural interest when special circumstances so warrant.

In the event the areas of natural interest include one or more of the top five markets and the carrying network is concurrently presenting a series telecast, the carrying network will have the right, upon the Committee's prior approval, to carry the game on a delay basis commencing not later than 8 p.m. the same day.

On the second Saturday in December each year, there shall be presented a national exposure consisting of a telecast of the final game of the National Collegiate Division II Football Championship and telecasts of the semifinal games of the National Collegiate Division I-AA Football Championship, with the network divided appropirately among the three games into respective areas of interest, such areas to be approved by the committee.

On the third Saturday in December, a national telecast of the Division I-AA national championship game shall be presented.

Coverage of these contests annually shall be scheduled by agreement of the carrying networks, or, if there is no such agreement, assigned to the carrying networks by the committee.

On the day a Division I-AA, Division II or Division III championship football game is played, neither of the carrying networks may telecast or authorize the telecast of any of the games, or any other college football game, from a transmitter located within 120 miles of the site of any of

the championship games without the NCAA's approval, nor telecast in the home television market of any participating team if, in the NCAA's opinion after consulting with the network, such telecast would reduce attendance at any of the championship games. If the site of a Division I-AA, Division II or Division III championship game is within 120 miles of a transmitter serving a television market of over 500,000 homes and a series game is scheduled to be telecast over that transmitter in conflict with any such championship game, the respective carrying network shall have the right to telecast the series game over the transmitter as an exception to the aforesaid limitation unless NCAA notifies it to the contrary, which notice shall be given only for reasonable purposes not inconsistent with the NCAA's past practices with respect to such championship games.

The football-playing institutions which are members of Divisions II and III (See Note 3) shall receive coverage by the carrying networks of their games each season as described below:

(1) Coverage each year of the Divisions II and III Football Championships as required in this Article.

(2) From among all such institutions, 20 appearances on 10 annual "regular-season" telecasts. Such regular-season telecasts shall not be considered part of the "series" telecasts and shall not be included in computations of series exposures or appearances.

(3) From among the members of Division II, 12 appearances on six such annual regular-season telecasts. From among the members of Division III, eight appearances on four such telecasts annually.

(4) Coverage of the Divisions II and III regular-season games would be provided annually as follows:

One network would televise the six Division II games in 1982 and 1984 and the four Division III games in 1983 and 1985. The other would televise the six Division II games in 1983 and 1985 and the four Division III games in 1982 and 1984.

In selecting its games, each network would assure that colleges representing each of Division II's four regions would receive four appearances during the two years it televised games of that division. Similarly, each network would assure that colleges representing each of Division III's four regions would receive two appearances during the two years of coverage.

(5) No member institution may appear more than one time during each two-year period of the Plan in such a regular-season telecast. No institution which previously has been selected for the Football Series or Supplementary Series during the then-current two-year period of the Plan may appear in such a telecast.

(6) Each telecast is to be released at least in the home television market of each participating institution.

(7) An institution which is ineligible under NCAA governing legislation for the National Collegiate Division II or III Football Championship shall be ineligible for participation in these regular-season telecasts.

Preseason Shows

(b) Each carrying network annually shall produce and televise a preseason promotional show, each show to be one hour in length, designed to assess the coming season, to stimulate interest in the series and to increase attendance at collegiate football games. The committee may approve another promotional show in lieu thereof.

Pregame and Postgame Shows

(c) Each carrying network annually shall televise regularly pregame and postgame shows adjacent to the afternoon series telecasts of a duration which will serve the best interests of both collegiate football and the network, the length of the pregame segment to be a minimum of 15 minutes. The primary purpose of the postgame show will be to present a comprehensive collegiate football scoreboard.

For night games, a pregame show shall be optional with the carrying network. A postgame show shall be required except on those dates when few or no college games are played, in which case the network may request the committee to waive this requirement.

Institutional Announcements

(d) During each series game telecast during the period of this Plan, the NCAA shall be allotted not to exceed four minutes of time during which announcements by or of interest to the NCAA or the participating institutions shall be presented by the carrying network. Materials for these announcements shall be provided the network by the committee or institution. At least 90 seconds of this time on each telecast shall be devoted to presentation of information on higher education, the contributions of the NCAA member colleges to the nation and the benefits and opportunities they provide the residents of their communities and states in many aspects.

During such telecasts, the time shall be allocated as follows:

For a national telecast:

NCAA	120 seconds*
30-second message for each institution	60 seconds
Four 15-second messages by NCAA	60 seconds

For a regional telecast:

NCAA	120 seconds*
30-second message for each institution	60 seconds*
Four 15-second messages by NCAA	60 seconds

* 90 seconds of this time shall be devoted to presentation of messages on higher education.

Promotion of Series

(e) During each year of this Plan, each carrying network shall submit through conveyance by personal representatives to the committee its plans for promotion of college football and its NCAA series that year. This submission shall include specific plans for pre- and in-season promotional campaigns and plans for implementation of each and shall be presented to the committee by April 1.

Videotapes of Telecasts

(f) Each network shall provide to the NCAA at the cost of the raw stock one complete set of three-quarter inch videocassettes for each game telecast by it. The NCAA may use all or any part of each cassette for any nonbroadcast purpose, and the NCAA may use excerpts of each cassette in any manner it deems fit. Upon the NCAA's request and at its expense for any additional costs incurred, such cassette shall be made available to the NCAA in New York City on Monday following the game.

Team Areas

(g) The carrying network of an NCAA series telecast shall not allow its personnel or its equipment to be in the team areas during a game. The network and its personnel shall observe all rules of college football at all times during preparation for or production of a telecast.

Game Officials

(h) It is permissible for a carrying network or company to place a microphone on the referee of a game televised on the NCAA series. Identification by the referee of a player who commits a violation for which a penalty is assessed is authorized by the committee, subject to the approval of the host institution of the game, the rules of the host institution's conference, if it is a member of such an organization, and the rules of the agency which assigns the game officials.

ARTICLE 23
Supplementary Series

During the four years of this Plan (1982-1985), the committee may formulate and administer a television program of NCAA college football within the United States, its territories and possessions identified as the Supplementary Series, in addition to the Football Series. Such television programs shall be scheduled on Saturday evenings or at such other times as not to conflict with the Football Series. The Supplementary Series has been arranged for the first two-year period of the Plan and may be continued or modified thereafter.

All applicable provisions of the Football Television Plan for 1982-1985, including the provisions of Article 15 governing Standards of Presentation and commercial sponsorship, shall apply to the Supplementary Series.

The Supplementary Series is designed to further the purposes of the Plan through the use of alternate video technologies.

During the first two years of the Plan (1982 and 1983), the Supplementary Series shall be limited to no more than 36 exposures annually. During the second two years of the Plan (1984 and 1985), there may be no more than 40 exposures annually. There may be no more than two exposures on each of the 14 Saturdays within the control period on which exposures of the network series are presented, aggregating 28 exposures per year. Further, the two exposures permitted on each such Saturday must originate in concurrent time periods (i.e., the starting times of the two exposures must be within 15 minutes of each other). These dates may not be vacated without the approval of the committee.

The other exposures may be presented on dates approved by the committee and at times which do not conflict with series telecasts.

A game may be presented on the Supplementary Series on a delayed basis.

It would be permissible for one or more companies to present one exposure (consisting of not to exceed four games) concurrently with the presentation by another company of a second exposure.

For the purposes of this Article, an "exposure" shall mean the cablecast and/or pay telecast of one game per market into multiple television markets. An exposure may consist of a national cablecast and/or pay telecast of a single game or regional cablecasts and/or pay telecasts of up to four games. An exposure may be originated as a television broadcast over a VHF or UHF station in a single television market.

Starting Times, Conflicts

No Supplementary Series program may start prior to 7 p.m., Eastern time, on any date on which a telecast is scheduled to begin from 3:45 to 3:50 p.m., Eastern time, or may conflict with any part of a network series telecast which has been scheduled for 12 days or more (e.g., a prime-time network telecast), or may conflict with any part of a 3:45 p.m., Pacific Time Zone, regional telecast with the following exception: If a carrying network schedules a 3:45 p.m., Pacific Time Zone, regional telecast pursuant to Article 8 of this Plan, a Supplementary Series release may conflict with such a regional telecast only if the Supplementary Series release consists of a national presentation of a single game. If the Supplementary Series presentation consists of regional programs, then the regional program scheduled for the Pacific Time Zone may not conflict with any part of a carrying network's 3:45 p.m., Pacific Time Zone, regional telecast.

Scheduling

On May 15 of each year of this Plan, or shortly thereafter, if authorized by the committee, the company(ies) participating in carriage of the Supplementary Series may select specific games and times for exposures for the season of the same year. This schedule will allow publication in appropriate program guides of those selections. It shall be understood, however, that such selections shall be tentative (and so identified in promotional materials) and subject to preemption by the carrying networks when they select their games for the Football Series in accordance with Article 10 of the Football Television Plan.

The announcement of any scheduling commitment—tentative or final—for the Supplementary Series must be approved in advance by the Football Television Committee. Such approval shall be subject to the terms of the Football Television Plan and the following ground rules:

1. A game scheduled for one weekend may not be moved from that weekend for the purpose of scheduling it for the Supplementary Series until each carrying network has determined its selection(s) for that weekend or has waived its respective right to select the game for telecasting on the Football Series.

   Such a game may be moved to a Thursday evening of the same week in which it is scheduled, however, and may be tentatively scheduled for the Supplementary Series prior to the time each carrying network makes its selection(s) for that weekend.

2. It is anticipated the carrying company will contact NCAA member institutions prior to May 15 in order to determine their interest in appearing on the Supplementary Series. No attempt shall be made by the carrying company, however, to interfere with the selection and scheduling process for the Football Series.

Appearance Rules

The following rules shall govern selections for the Supplementary Series:

1. Any team which appears in a game broadcast nationally on a network series in any year may not appear on the Supplementary Series in the following year. For example, if team X appeared in a game televised nationally on a series in 1981, it may not appear on the Supplementary Series in 1982. Likewise, by way of example, if team X appears in a network series national telecast in 1982, it may not appear on the Supplementary Series in the next year, 1983.

2. If a team appears in a network series regional telecast once in any year, it may appear twice on the Supplementary Series the following year.
3. Any four teams which have appeared twice in network series regional telecasts in any year may each appear once on the Supplementary Series the following year, provided their respective opponents had not so appeared twice in the previous year. Except for such four teams, if a team appears two or more times in network series regional telecasts in any year, it may not appear on the Supplementary Series the following year.
4. If a team does not appear in a network series telecast in any year, it may appear three times on the Supplementary Series in the following year.
5. Any appearance on the Supplementary Series will not reduce an institution's appearance opportunities on the network series nor its opportunities to present exception telecasts under the provisions of Article 16.
6. The two carrying networks shall have priority over the Supplementary Series in the choice of any NCAA game for the network series, if the choice is made no later than the Monday preceding the date on which the game will be played.
7. For the 1982 and 1983 seasons, a minimum of four of the 38 team appearances shall be reserved each year for institutions which have football programs classified in Division I-AA Football.

Foreign Sales

Sales of simultaneous or delayed presentations of the exposures of the Supplementary Series outside the United States, its territories and possessions may be approved by the committee. Income from any such sale shall be divided

between the participating institutions (55 percent) and the carrying company (45 percent) and shall be forwarded as due to the host institution of each such televised game.

Secondary Sales

Sales within the United States, its territories or possessions of simultaneous presentations of the exposures of the Supplementary Series by the carrying company for release by subscription television stations shall be permissible if made under terms of this Plan and approved by the committee. Income from any such sale shall be divided evenly between the carrying company and the participating institutions and shall be forwarded as due to the host institution of each such televised game.

Rights Fees

Rights fees, as agreed to by the company and host institution, for any game televised hereunder shall be payable in full to that institution within 10 days of the day on which the televised game is played.

Announcer Approval

The committee shall have the right of consideration and prior approval of all personnel proposed for on-air work by the carrying companies.

Promotional Programming

During each season of the Plan, each carrying company shall produce and televise a preseason program designed to promote college football for that season and a postseason review, each show to be one-half hour in length. No pregame show shall be required for Supplementary Series presentations.

The carrying company shall meet the requirements of Article 22 of the Plan concerning presentation of promotional material provided by the NCAA and the participating institutions.

Exception Telecasts

A company carrying a Supplementary Series presentation has no right of prior negotiation with respect to any exception telecast and shall not have the same rights or preemption to a game for which the committee has authorized an exception telecast as does a carrying network.

The company may not, by electing to present the game of a member institution (subject to contracting for such a presentation with the host institution), thereby gain exclusive rights for the televising of the game. A host institution or visiting institution which has been authorized by the committee to present an exception telecast or cablecast shall retain the right to make the exception presentation in addition to the Supplementary Series presentation.

ARTICLE 24
Assessments Upon Receipts

In each year of the Plan, a basic assessment shall be made upon the football television receipts derived from the Football Series and the Supplementary Series and the proceeds shall be used at the direction of the NCAA Executive Committee (a) to meet the requirements of NCAA television administration; (b) to advance the interests of intercollegiate football, and (c) to advance the interests of intercollegiate athletics in general, including the NCAA Postgraduate Scholarship Program. In each year of the Plan, a supplemental assessment shall be made upon the television receipts derived from the Football Series and Supplementary Series and the proceeds shall be used at the direction of the NCAA Executive Committee for the payment

of expenses for each qualified participant in NCAA championship competition. The amount of such assessments shall be determined annually by the Executive Committee.

All such assessments shall be withheld by each carrying network and each company televising the Supplementary Series from the fees payable by them and shall be paid to the NCAA in installments on or before October 1, November 1 and December 1 of each year.

ARTICLE 25
Modification of Plan

The committee shall have authority to modify this Plan to further its stated purposes, provided any substantive change shall be subject to approval of the NCAA Council, and any change adversely affecting the rights of either carrying network or any company carrying the Supplementary Series must be approved by that network or company.

TELEVISION FORMS AND INFORMATION

For the appropriate forms with which to apply for a 400-mile Exception Telecast, Sellout Exception Telecast or Closed Circuit Telecast, a member institution should contact the member of the Football Television Committee who represents its NCAA District. For forms for Division II and Division III Exception Telecasts, requests should be made to the Television Program Director.

For information on any aspect of the NCAA Television program, please contact the Program Director at the NCAA National Office.

PLAINTIFFS' EXHIBIT 7

AGREEMENT

AGREEMENT dated as of July 24, 1981 by and between ABC SPORTS, INC., a subsidiary of American Broadcasting Companies, Inc., 1330 Avenue of the Americas, New York, New York 10019 (herein called "ABC") and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Nall Avenue at 63rd Street, P. O. Box 1906, Shawnee Mission, Kansas 66222 (herein called "NCAA").

1. NCAA hereby grants to ABC the right for each of the four NCAA football seasons, 1982 to 1985, inclusive, to telecast live 14 "exposures" (i.e., the release on a single date of live game telecast into each television market on the national network) of NCAA football games, providing at least 70 team appearances, selected and scheduled in accordance with the "Ground Rules for Two-Network Scheduling of the 1982-1983 and 1984-1985 NCAA Football Television Series" attached hereto ("Ground Rules"), and contracted for in accordance with the Principles included in the April 17, 1981, letter of Wiles Hallock to James Frank and thereafter amended ("Principles"), a copy of which has been provided to ABC. ABC shall freely negotiate and contract individually with NCAA member institutions for the telecasting of such games.

2. (a) Subject to the terms and conditions hereinafter specified, ABC agrees to pay the following minimum aggregate compensation to the participating NCAA member institutions for the games to be telecast each football season of the four-year period:

For 1982:	$ 29,500,000.
For 1983:	32,000,000.
For 1984:	34,250,000.
For 1985:	36,000,000.
Total	$131,750,000.

In the event of a general economic downturn of major national proportions prior to January, 1984 resulting in a reduction of ABC's advertising revenues of major proportions from January, 1982, to January, 1984, NCAA agrees to discuss in good faith with ABC an agreement to reduce the aforesaid minimum aggregate compensation for 1984 and 1985 by not more than $1,000,000 per year.

There shall be deducted from such compensation, however, and paid to the NCAA annual assessments in amounts to be determined by the NCAA Executive Committee, as shall be provided in the 1982-1985 NCAA Football Television Plan ("Plan"), and in the years when ABC telecasts any of the following games the following applicable annual television rights fees: For the Division I-AA Football semifinal games, the total sum of $300,000; for the Division I-AA Football Championship game, the sum of $450,000; for the Division II Football semifinal games, the total sum of $220,000; for the Division II Football Championship game, the sum of $300,000; for the Division III Football Championship game, $150,000; and for the three regular season Division II and two regular season Division III games, the total sum of $120,000.

If the aggregate compensation paid by ABC to NCAA member institutions under this agreement for any football season shall be less than the annual minimum aggregate compensation specified above less the assessments and annual television rights fees previously paid to the NCAA, the difference shall be paid to the NCAA and shall be allocated and distributed by it to or for the benefit of such member institutions.

(b) This agreement was negotiated on the basis that, if the award to another network for the rights not granted to ABC were to specify a basic minimum aggregate compensation for the said four seasons greater than that agreed to be paid by ABC, then ABC would agree that the amount to be paid by ABC correspondingly would be increased up to an amount not

exceeding $135,000,000, and, if such award to another network were to specify a basic minimum aggregate compensation lesser than that agreed to be paid by ABC, then the amount agreed to be paid by ABC correspondingly would be increased. The compensation specified in subparagraph 2(a), above, reflects such basic minimum aggregate compensation to be paid by the other carrying network for the similar rights not granted to ABC hereunder.

(c) It is the NCAA's present intention that the awards to both networks will contain substantially equivalent terms. If, however, the final contract with another network includes terms, other than such compensation, which are more favorable to the other network than the terms herein contained for ABC, then this agreement shall be modified, at ABC's written request given within fifteen days following ABC's receipt of the NCAA's written notice of such more favorable terms, to include such more favorable terms. Any such more favorable terms not contained in the initial written contract with another network shall not be agreed to by NCAA without first discussing same with ABC.

(d) If the NCAA makes no final contract with another network and the NCAA decides to make major alterations in the two network program set forth herein, then, upon written notice from NCAA to ABC, this agreement shall terminate. In such event ABC shall have a right of exclusive prior negotiation with respect to rights under the altered program, to be conducted during normal business hours, for a period of five consecutive business days, said period to commence, after consultation with ABC, upon written notice from the NCAA to ABC. If the parties cannot reach agreement during such five days, the NCAA will reduce its final offering to writing and agrees not to contract for the same rights with another network for a lesser monetary figure without giving ABC two business days to accept same. It is agreed that for purposes of such exclusive negotiation and the NCAA's final offer, if any, all of

the provisions of subparagraph 2(c), above, shall continue to apply.

3. (a) The award to ABC shall be subject to the terms of the 1982-1985 NCAA Football Television Plan to be prepared and adopted by the NCAA containing provisions consistent with the terms of this agreement and with the terms of the Principles constituting the policy and program for football television as approved by the NCAA membership, and containing the terms of the 1978-1981 Plan as amended for the 1980 and 1981 NCAA football seasons which are not inconsistent with said Principles or this contract. Any provision in such 1982-1985 Plan not specifically encompassed by such Principles or this agreement which varies from the provisions of the 1978-1981 Plan, as amended for the 1980 and 1981 NCAA football seasons, and which affects ABC's telecasts hereunder, shall be subject to prior negotiation and agreement with ABC. Nothing in this paragraph 3(a) shall be construed so as to preclude ABC from initiating discussion regarding changes in the exception television provisions or any other aspect of said Plan. Any modifications of the Plan after adoption which adversely affect ABC's rights shall be subject to mutual agreement.

(b) The 1982-1985 Plan will not contain provisions similar to those contained in parts (b), (c), (d) and (e) of Article 22 of the 1978-1981 Plan; provided, however, the 1982-1985 Plan shall include a provision requiring ABC and the other carrying network each to produce and televise annually a pre-season promotional show, or in lieu thereof another promotional show approved by the NCAA Football Television Committee, each show to be one hour in length, designed to stimulate interest in collegiate football.

(c) The 1982-1985 Plan will provide that the network controlling the date for the series games shall have a right of first negotiation for a period of time to be determined by the member (which period shall be reasonable under the circum-

stances) before a member concludes a contract for an exception telecast of a game on that date.

(d) The 1982-1985 Plan will provide that the carrying networks shall be provided an opportunity to change coverage from one-sided games to more competitive games during regional telecasts under the following rules: (i) such coverage shall not be changed until after completion of the half time program, (ii) such coverage shall not be changed in a game in which the point differential is less than 18 points; (iii) such coverage shall not be changed in the home television market areas of the participants; and (iv) such coverage shall not be changed by each network more than once per season for any team.

4. (a) The commercial minutes in each exposure shall be distributed in accordance with the Commercial Format attached hereto which contemplates an overall limit of 26 commercial minutes per exposure.

(b) Only sponsors approved by the Football Television Committee may be utilized for any football game or other program telecast pursuant to the 1982-1985 Plan. Approved sponsors shall not include advertisers of the following: Alcoholic beverages (except malt beverages, beer and wine as limited in subparagraph 4(e) below), cigarettes, professional sports organizations or personnel (except as specified hereafter) and any advertising which portrays or otherwise directly promotes gambling. Advertisements shall be prohibited that contain reference to or photographs of the games, personnel (except as specified hereafter), broadcasts, telecasts or other activities of professional sports organizations. No advertisement may relate the advertiser, or the advertised product, to any institution or athlete involved in the game or program, or to the NCAA, unless prior written approval has been granted by the Executive Director of the NCAA.

(c) NCAA policy excludes advertisements featuring active professional football athletes. The network shall inform each of its advertising sponsors of this NCAA policy and the importance thereof to the NCAA. If any such sponsor determines nevertheless to advertise contrary to said policy, the network will inform NCAA of that fact and will use every reasonable effort to avoid any repetition of that action by such sponsor. Advertisements featuring active professional athletes in other sports shall be permitted.

(d) NCAA intends the restrictions contained in subparagraphs 4(b) and 4(c) above, and 4(e) below, to apply to advertisements presented by local stations during station breaks in such telecasts. ABC shall inform its local stations carrying such telecasts of such restrictions, and should NCAA or ABC observe infractions of these restrictions by such local stations, ABC will take appropriate action immediately with the station or stations involved; provided failure to comply by local stations shall not in and of itself constitute a breach of this contract.

(e) Sponsors advertising malt beverages, beer or wine are approved on a limited basis in game telecasts, pre-game shows and post-game shows. In each pre-game show, three such 30-second commercials, and in each post-game show originating from the site of a game two such 30-second commercials may be presented. There shall be no limitation with respect to such commercials in post-game shows originating from the studio. There shall be within each game telecast, a maximum of nine such 30-second commercials: One within positions one to three, one within positions four to six, one within positions seven to nine, one within positions 10 to 11, one within positions 12 to 14, one within positions 15 to 17, one within positions 18 to 20, one within positions 21 to 23, and one within positions 24 to 25 (as such positions are set forth in the attached Commercial Format). There shall be no more than 270 seconds of

commercial time permissible for such sponsors in the aforesaid nine allowable positions during each game.

In any other show televised under the provisions of this agreement or the 1982-1985 Plan, sponsors advertising malt beverages, beer or wine are approved for a maximum of three 30-second commercials during each 30-minute period.

(f) NCAA agrees to request its members not to permit cigarette advertising in their stadia during the telecast of any series game.

5. The award to ABC shall be subject to the approval of the terms of this contract by a two-thirds vote of the members of the NCAA Council present and voting within three days after the date of execution. If the Council fails to approve such contract, NCAA will give the network in writing the specific objections of the Council, will negotiate in good faith with the network in an attempt to satisfy such objections for five business days from the date of receipt by ABC of such objections, and will not grant such rights to any third party during such five-day period. If such objections are not satisfied within such five-day period, this agreement shall terminate. The award to ABC is subject to the following further terms and conditions:

(a) ABC's rights with respect to telecasting of the games acquired by it and included in its 14 exposures shall consist of the right to simultaneous telecasting, pursuant to the Plan, throughout the world in any area in which simultaneous telecasting is possible and will occur. Additionally, ABC's rights shall include the right to telecast such exposures on a delayed basis in Hawaii and Alaska within seven (7) days following the game provided such a telecast shall not conflict with any high school game. ABC's rights shall include the right to use excerpts of the games of any length on a delayed basis anywhere in the world, in any news or sports program within 48 hours of

the conclusion of the game, and thereafter excerpts of two minutes or less for newscasts, ABC's promotional purposes and anthologies produced by ABC. ABC's rights shall include the right to telecast in full on a delayed basis any series game previously telecast by it hereunder as fill in the event that substantially all of any telecast of the basic series of games by ABC hereunder is prevented due to any of the reasons set forth in paragraph 5(g) hereafter. ABC shall have the right also during regional telecasts of the games of the series to utilize in the post game show of the game in one region live coverage or the taped highlights of games telecast by ABC in other regions that day.

(b) The television rights acquired by ABC from the NCAA's members may include the right to telecast, cablecast or otherwise exhibit anywhere in the world except in the United States, its territories or possessions, the games included in its 14 exposures, or any part or parts thereof, by any and all means of delayed visual communication, including delayed telecasting and cablecasting, by use of video tape, cassette cartridge, video disc, record, film or otherwise provided that, if ABC acquires such rights, ABC shall pay to the participating NCAA members not less than 55% of the gross receipts derived from the use of the rights in this paragraph described less "expenses." Expenses shall include costs in connection with preparation, dubbing, subtitling, converting, packing and shipping any film or tape of the coverage, foreign taxes levied upon or arising in connection with the use of such rights and the cost of any raw stock, and residuals or other fees not exceeding scale, which may be claimed per contract by writers, talent, or other persons who were involved in the original production or telecasting.

(c) The television rights acquired by ABC from the NCAA's members also may include the right to exhibit in

the United States, its territories or possessions, the games included in its 14 exposures, or any part or parts thereof, by such means of delayed visual communication as videotape, cassette cartridge, video disc, record, film or otherwise, but excluding all forms of telecasting and cablecasting, provided that if ABC acquires such rights, ABC shall pay to the participating NCAA members not less than 55% of the gross receipts derived from the use of the rights in this paragraph described less "expenses." Expenses shall include costs in connection with preparation, dubbing, subtitling, converting, packing and shipping any film or tape of the coverage, taxes levied upon or arising in connection with the use of such rights and the cost of any raw stock, and residuals or other fees not exceeding scale which may be claimed per contract by writers, talent, or other persons who were involved in the original production or telecasting.

(d) ABC will provide to NCAA at cost (not exceeding $250 per set) one complete set of three-quarter inch video cassettes for each game telecast by it; and NCAA may use all or any part of each set of video cassettes for any non-broadcast purpose, and NCAA may use excerpts of each cassette in any manner it deems fit. If NCAA uses any cassette for any non-broadcast commercial purpose other than for purposes of promoting college football it shall pay to ABC a reasonable portion of the net receipts for such use. If NCAA uses more than four minutes of any cassette for any broadcast purpose (other than for news clips) It shall pay to ABC a reasonable portion of the net receipts for such use. NCAA agrees that it will in connection with all uses thereof delete from each such video cassette all commercial and promotional announcements (other than NCAA promotional announcements) and the voices and images of ABC personnel. NCAA agrees to defend and indemnify ABC against any fees or payments which may be claimed by others for any

use by NCAA of such cassettes for other than file and reference purposes, provided ABC shall notify NCAA of any such obligations of which ABC has knowledge when such cassettes are furnished to NCAA. Upon NCAA's request and NCAA's expense for any additional costs incurred ABC shall make any such cassette available to NCAA in New York City on the Monday following the game.

(e) If, during the 1982 through 1985 NCAA football seasons, there are telecasts or cablecasts not contemplated under this agreement of major college football (i.e., Division 1-A) involving as participants present members of the NCAA or if major college football members (i.e., Division 1-A) of the NCAA are bound on or after April 1, 1982 by agreements to telecast contrary to the 1982-1985 NCAA Football Television Plan, or refuse on or after April 1, 1982 to participate in said Plan, then either party may by written notice to the other within thirty days thereafter initiate negotiations for modifications of the terms of this agreement, including a reduction in the minimum aggregate compensation based upon the anticipated loss of audience attributable thereto and the resultant damage to ABC's rights. If agreement on such modification of terms cannot be reached after thirty days of negotiation, then ABC may elect to terminate this agreement by written notice given to the NCAA within five days after the conclusion of such negotiation. In the event the agreement with the other network is terminated by the other network for any of the foregoing causes, then upon written notice from NCAA to ABC this agreement shall terminate. In the event this agreement is terminated by ABC for any of the foregoing causes NCAA shall be free to amend or revise its 1982-1985 Football Television Plan or program and to negotiate freely and in any manner with ABC and/or any third party for the televising of the football games of its members. In the event this agreement is terminated by

NCAA for any of the foregoing causes NCAA shall be free to amend or revise its 1982-1985 Football Television Plan or program, but ABC shall then have a right of exclusive prior negotiation for television rights under any new plan. Said negotiations shall be conducted during normal business hours, for a period of five consecutive business days, said period to commence, after consultation with ABC, upon written notice from the NCAA to ABC. If the parties cannot reach agreement during such five days, the NCAA will reduce its final offer to writing and agrees not to contract for the same rights with another network for a lesser monetary figure without giving ABC two business days to accept same.

(f) If this contract subsists for its full term the rights granted to ABC shall include a prior negotiation right for the sale of live broadcast television rights for one or more seasons covered by any NCAA Football Television Plan for a term immediately subsequent to the period of this contract. Such prior negotiation right shall mean that NCAA will negotiate in good faith with ABC with regard to price and such other and additional terms and conditions therefor as NCAA shall elect during a 30-day period selected by NCAA after consultation with ABC. Such negotiation may take place contemporaneously with negotiations with the other major broadcast television network having series rights under the 1982-1985 Plan if the subsequent Plan contemplates two or more broadcast networks. If the subsequent Plan contemplates the use of only one broadcast network, such negotiation shall take place prior to negotiation with any other television broadcast network and shall encompass all such rights. Said 30-day period shall commence no earlier than March 1, 1985, and shall be concluded before September 1, 1985. Negotiations during said 30-day period shall be conducted only during normal business hours (9:00 a.m. through 5:00

p.m.) and on normal business days (Monday through Friday, excluding national holidays), unless otherwise agreed by the parties. If by the end of such 30-day period the parties negotiating have not reached agreement, NCAA will furnish ABC with the written terms and conditions of its final offer and ABC shall have three business days to accept same. If ABC fails to accept said written offer within said period, then the NCAA shall be free to negotiate at will with anyone with regard to the rights subject to that negotiation. NCAA shall not be prohibited from talking to any other person regarding such television rights during or prior to the aforesaid negotiating period, provided NCAA does not offer to sell the television rights to be negotiated, or negotiate with respect to the sale of same, during or prior to the negotiating period relating to same. Notwithstanding the foregoing, the NCAA may negotiate with respect to cable/pay television rights referred to in subparagraph 5(o), below, contemporaneously with but not prior to negotiations with ABC with respect to broadcast television rights, provided however NCAA shall not enter into a contract with respect to such cable/pay television rights with any other party prior to the conclusion of negotiations with ABC hereunder.

(g) In the event that the telecasting by ABC for any exposure of the basic series of games during the 1982, 1983 and 1984 NCAA football seasons is totally prevented due to war or national emergency, governmental restriction, preemption for an event of overwhelming public importance the occurrence of which is not within the control of ABC, the application of broadcast standards developed by ABC to insure compliance with governmental requirements, weather, labor dispute (on two occasions only), act of God, failure of transmission facilities, or other like causes beyond ABC's control, or the failure to play any such game, then ABC may either substitute another game

or games for telecast on the same date or, if this is impossible because of scheduling difficulties, telecast an additional game or games on a later date in lieu thereof, and there shall be no diminution of the aggregate minimum compensation payable hereunder. If such telecast prevention occurs in the 1985 season and because of scheduling difficulties it is impossible to make up the "lost" telecast in 1985, ABC shall use its best efforts to reschedule the telecast for a date in 1986 or 1987 if ABC has the television rights for similar games for those years, but if ABC is unable to do so because of scheduling difficulties, there shall be no diminution of the aggregate minimum compensation payable hereunder with respect to the first exposure thus prevented, but there shall be a proportionate reduction in the minimum aggregate compensation payable hereunder with respect to any additional exposure thus prevented.

(h) In the event that any telecast of the basic series of games by ABC is commenced but is thereafter materially interrupted due to any of the reasons set forth in subparagraph 5(g) above, it is understood that ABC shall reschedule for inclusion in a subsequent game or games (in addition to the commercials permitted in the format for such game) at later dates during the term of this contract, or in 1986 if ABC has the television rights for similar games for 1986, any commercials ABC is unable to telecast because of such material interruption. However, should the number of commercials or other circumstances be such as to make it unreasonable in NCAA's opinion to reschedule such commercials in a later game or games, or if such rescheduling is impossible because ABC does not have the television rights beyond 1985 and the lost commercials cannot be made up in 1985, there shall be a proportionate reduction in the moneys payable pursuant to this Agree-

ment based upon the number of commercials actually telecast in relation to the number of commercials scheduled and sold.

(i) It is understood and agreed that for the purpose of paragraph 5(g) hereof, the requirements of the Plan with respect to appearance limitations and requirements may be waived by the Television Committee.

(j) ABC shall schedule its NCAA football programming to allow a reasonable post-game show consistent with prior years; provided that the parties hereto agree that ABC shall be automatically released from the requirement of telecasting any such show if such telecast would cause ABC to violate any applicable provisions imposed by the Federal Communications Commission.

(k) Division I-AA Championship Football Games played in the Eastern (light levels permitting), Central or Mountain time zones will be scheduled to commence at approximately 1:35 p.m. current New York time ("CNYT"), except that a game in the Mountain time zone shall commence at approximately 2:05 p.m. CNYT unless NCAA elects to start the game at the earlier specified time and except ABC will endeavor to commence its telecast of a game in the Central time zone so that the kick-off shall occur at approximately 2:05 p.m. CNYT.

(l) In the event ABC desires to telecast a series game not theretofore scheduled involving as a participant a member of the NCAA which was not eligible for an appearance under the Plan until less than one week prior to such game, it can procure a waiver of the five days selection limitation to be set forth in the Plan upon application to the NCAA Television Committee prior to contacting such participant.

(m) On the day a Division I-AA, Division II or Division III Championship football game is played ABC agrees not to telecast or authorize the telecast of any of

said games, or any other college football game, from a transmitter located within 120 miles of the site of any of the said games without NCAA's approval, nor to telecast in the home television market of any participating team if, in NCAA's opinion after consulting with ABC, such telecast would reduce attendance at any such game. If the site of such Division I-AA, Division II or Division III Championship game is within 120 miles of a transmitter serving a television market of over 500,000 homes and a Series game is scheduled to be telecast over said transmitter in conflict with any such Championship game, ABC shall have the right to telecast the Series game over such transmitter as an exception to the aforesaid limitation, unless NCAA notifies ABC to the contrary which notice shall only be given for reasonable purposes not inconsistent with its past practices with respect to such Championship games.

(n) If ABC shall be televising NCAA football games under this agreement in a season in which Division I-A football playoffs are instituted, the NCAA Council will recommend to the appropriate authority that ABC be given the exclusive right of first negotiation with respect to the televising of such playoffs.

(o) NCAA shall advise ABC when it is prepared to negotiate the sale of rights for the supplementary series for simultaneous televising of football games on cable and/or pay over-the-air television as described in the Principles ("Supplementary Series"), and will afford ABC a non-exclusive opportunity to negotiate for same. NCAA represents that the following rules will specifically govern the Supplementary Series:

(i) Any team which appears in a game broadcast nationally on a network series in any year may not appear on the Supplementary Series in the following

year. For example, if team X appears in a game broadcast nationally on a network series in 1981, it may not appear on the Supplementary Series in 1982. Likewise by way of example, if team X appears in a network series national telecast in 1982, it may not appear on the Supplementary Series in the next year, 1983.

(ii) If a team appears in a network series regional telecast once in any year, it may appear twice on the Supplementary Series the following year.

(iii) Any four teams which have appeared twice in network series regional telecasts in any year, may each appear once on the Supplementary Series the following year provided their respective opponents have not so appeared twice in the previous year. Except for such four teams, if a team appears two or more times in network series regional telecasts in any year, it may not appear on the Supplementary Series the following year.

(iv) If a team does not appear in a network series telecast in any year, it may appear three times on the Supplementary Series in the following year.

(v) Appearance on the Supplementary Series will not reduce an institution's appearance opportunities on the network series.

(vi) The two carrying networks for the network series will be given first choice of all NCAA games in each year.

(vii) In the Supplementary Series there may be no more than a total of 36 exposures in each of the first two years and 40 exposures in each of the last two years of the Plan. There may be no more than two exposures on each of the 14 Saturdays of the Tele-

vision Series aggregating 28 such exposures per year. Further, it is agreed that the two exposures permitted on each of the 14 Saturdays of the Television Series must originate in concurrent time periods (i.e., the starting times of these two exposures must be within 15 minutes of one another). For the purposes of this subparagraph (o), an "exposure" shall mean the cablecast and/or pay telecast of a single game into each television market on a network on a single date. An exposure may consist of a single game or regional cablecasts and/or pay telecasts of up to four games.

(viii) No Supplementary Series cablecast and/or pay telecast may start prior to 7:00 p.m. Eastern time on any date on which a network series telecast is scheduled to begin after 3:45 p.m. Eastern time, or may conflict with any part of a network series telecast which has been scheduled for 12 days or more (e.g., a prime time network telecast), or may conflict with any part of a 3:45 p.m. Pacific Time Zone regional telecast with the following exception: If a carrying network schedules a 3:45 p.m. Pacific Time Zone regional telecast pursuant to paragraph 18 of the Ground Rules a supplementary series cablecast and/or pay telecast may conflict with such regional telecast only if the supplementary series cablecast and/or pay telecast consists of a national presentation of a single game. If the supplementary series cablecast and/or pay telecast consists of regional cablecasts and/or pay telecasts, then the regional cablecast and/or pay telecast for the Pacific Time Zone may not conflict with any part of a carrying network's 3:45 p.m. Pacific Time Zone regional telecast.

6. ABC and the other carrying network for the network series shall produce and telecast the National Collegiate Foot-

ball Championships of Divisions I-AA, II and III during the 1982 through 1985 NCAA football seasons, as specified in the 1978-1981 NCAA Football Television Plan except as modified by the terms of this paragraph, such games to be televised on a parity basis to be negotiated separately by each of the two carrying networks and the Football Television Committee. The television scheduling of such games shall take into account the obligations of either carrying network to televise professional football regular season and playoff games on the second and third Saturdays in December, it being understood that NCAA shall not schedule the games which ABC is obligated to televise so as to conflict with ABC's obligations to telecast NFL regular season and/or playoff games. If agreement on scheduling telecasts on such parity basis is not reached, such Championships shall be scheduled as hereafter provided. In any event the areas of coverage and release shall conform to the following provisions:

(a) On the first Saturday in December of 1982 and 1984 ABC shall telecast, and on the first Saturday in December of 1983 and 1985 the other carrying network shall telecast, in the areas of natural interest of the participating institutions and the sites thereof if such games are sold out, the Division II semifinal games and the National Collegiate Division III Football Championship game, such areas of release to be agreed upon by the respective carrying network and the Football Television Committee.

(b) On the second Saturday in December of 1983 and 1985 ABC shall telecast, and on the second Saturday in December of 1982 and 1984 the other carrying network shall telecast as a national exposure on a cumulative basis the Division I-AA semifinal games and the National Collegiate Division II Football Championship game, with the respective areas of release to be approved by the Football Television Committee.

(c) On the third Saturday in December of 1982 and 1984 ABC shall telecast, nationally, and on the third Saturday in December of 1983 and 1985 the other carrying network shall telecast nationally, the National Collegiate Division I-AA Football Championship game.

(d) "Areas of natural interest" shall mean the general geographical areas occupied by members of the competing institutions' conferences, and if a competing institution is not a member of a conference, then the general geographical areas occupied by the competing institution's traditional rivals. The Committee may agree to an area of release deviating from complete coverage of the areas of national interest when special circumstances so warrant.

(e) In the event the areas of natural interest include one or more of the top five markets and the carrying network is concurrently presenting a series telecast the carrying network will have the right, upon the Committee's prior approval, to carry the game on a delay basis commencing not later than 8:00 p.m. the same day.

7. ABC understands and agrees that this agreement may be disclosed upon request, to any qualified representative of an NCAA member which has a legitimate interest, and that copies thereof may be furnished by the NCAA, to any chief executive officer of any active NCAA member institution in accordance with the NCAA Council's policy governing disclosure. The parties agree otherwise to endeavor to keep this agreement confidential.

8. In accepting the rights herein awarded to it ABC agrees to telecast the games of each exposure and the appropriate football championship games in each of the years covered hereby in accordance with the terms of this agreement. Such rights may not be assigned without the consent of the NCAA.

9. This Agreement contains the entire understanding of the parties hereto relating to the subject matter herein contained, and this Agreement cannot be changed or terminated orally.

10. All notices hereunder shall be in writing and shall be by personal delivery or by mail or by telegraph, at the respective addresses of the parties hereto, hereinabove set forth, or such other address or addresses as may be designated by either party. Such notices shall be deemed to have been given upon being mailed, postage or other charges prepaid, or upon delivery to a telegraph office, charges prepaid or to be billed.

This agreement on the part of ABC is subject to approval by the board of directors of American Broadcasting Companies, Inc. on or before February 28, 1982, and if so approved shall include the agreement of American Broadcasting Companies, Inc. to guarantee this agreement.

ABC SPORTS, INC.

By /s/ James R. Spence, Jr.
Senior Vice President

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

By

Executive Director

COMMERCIAL FORMAT

The commercial format for NCAA College Football for 1982, 1983, 1984 and 1985 shall include 26 minutes distributed as indicated:

Start of Game Telecast

(1) Commercial (30 seconds or 60 seconds)**
(2) Commercial

Start of First Quarter

(3) Commercial
(4) Commercial
(5) Commercial
(6) Commercial

End of First Quarter

(7) 2 Commercials (60 plus 60)

Start of Second Quarter

(8) Commercial
(9) Commercial
(10) Commercial
(11) Commercial

End of Second Quarter

Halftime
Station break (63 seconds) T
(12) Commercial *
(13) 2 Commercials (60 plus 30)

Start of Third Quarter

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* 30 seconds of this may run adjacent to commercial position No. 2.

** Commercial positions Nos. 1 and 25 are to total 90 seconds. Duration of each to be network's option.

T If the policy of the carrying network concerning the length of station breaks changes from 63 seconds, the Football Television Committee will consider the change and will approve it if reasonable.

(14) Commercial
(15) Commercial
(16) Commercial
(17) Commercial

End of Third Quarter

(18) Commercial
Station break (63 seconds) T

Start of Fourth Quarter

(19) Commercial
(20) Commercial
(21) Commercial
(22) Commercial

End of Fourth Quarter

(23) Commercial +
(24) Commercial +
(25) Commercial (30 seconds or 60 seconds) ** +

End of Game Telecast

("Commercial" means an interval for commercials.)

** Commercial positions Nos. 1 and 25 are to total 90 seconds. Duration of each to be network's option.

+ Commercial No. 25 may not be inserted into fourth quarter. Commercial positions Nos. 23 and 24 may be inserted into the fourth quarter if position No. 23 is preceded by a natural timeout used for game commentary, and if there are sufficient natural times out thereafter to accommodate them. In addition if the length of the game telecast will exceed three hours and five minutes, then, following another natural time out used for game commentary, an additional 60 seconds of commercial time may be used during the fourth quarter within a natural timeout following a score (touchdown, field goal or safety).

T If the policy of the carrying network concerning the length of station breaks changes from 63 seconds, the Football Television Committee will consider the change and will approve it if reasonable.

DEFENDANT'S EXHIBIT MI

September 22, 1981 (d)

GROUND RULES FOR TWO-NETWORK SCHEDULING OF THE 1982-1983 AND 1984-1985 NCAA FOOTBALL TELEVISION SERIES

1. The NCAA Football Television Committee (or a subcommittee of the Football Television Committee) shall adjudicate the scheduling process in accordance with these ground rules and the NCAA Television Plan to be adopted.

2. It shall be the goal of the NCAA Football Television Committee that the two series of 14 exposures as carried by the two contracting television networks shall be as equal and balanced as possible. The Committee shall retain the right to reject any selection which, in its judgment, would have the effect of injuring or restricting the scheduling opportunities of the other network contrary to the goals of these ground rules and the Plan. At the conclusion of the process set forth in Nos. 4 and 5, the Committee may reverse for that season the order of selection described in No. 6 if, in its opinion, the selections to that point have resulted in one of the carrying networks being significantly disadvantaged compared with the other network as to the attractiveness and ratings potential of its schedule.

During the four years of the Plan, the Committee reserves the right, after separate consultation with each of the networks, to make modifications in the selection process herein deemed necessary for the benefit of the series.

3. There shall be no restriction on communications between each of the two carrying networks and NCAA member institutions.

4. Not later than March 1, each year, the Committee shall ascertain the preferences of each of the networks for a minimum of three "special dates" per network on which each

network shall present telecasts during that season, and the Committee shall endeavor to resolve any conflicts. Any unresolved conflicts remaining shall be resolved by a draft, started by a flip of the coin, whereby each network selects its remaining special dates. In each such case, the network shall select a specific date, a specific game (or games) and a specific time of day at which it shall present the selected game(s).* The "special dates" are: the initial Saturday of the series each year; Thanksgiving; the Friday and Saturday following Thanksgiving; the first Saturday in December; Labor Day; Veterans Day; weeknights, Monday through Thursday, and any Saturday night approved by the Committee. Each network may be authorized to televise on the same special date, but head to head scheduling or overlaps shall not be authorized thereon except as provided in paragraph 16 thereafter, and except if both networks select the Friday following Thanksgiving, then an afternoon exposure shall be available to each network on that Friday, and in such case minimal overlap may be scheduled during the period from 2:45 p.m. Eastern Time to the conclusion of the first telecast which shall start at the normal time for an early exposure of a doubleheader (12:20 to 12:35 p.m. Eastern Time).

To initiate the drafting process, a coin shall be flipped to determine which network shall have the right of first selection in 1982. Thereafter, the networks shall alternate selections until the minimum three special dates have been picked for each

* The selection of the specific game may occur at any time until Monday of the week of the game, but if selection of the game for a special date is delayed, the move of a game from another date can only be made from a date the network controls. In no such case, however, shall the selection of a special date constitute control of any game on that date until the end of the equity draft phase (paragraph 5) or until selection of the specific game (which selection can only be made from the remaining unselected games on that special date), which ever first occurs.

network. The 1982 network also shall have first selection in 1985 at whatever phase of the selection process an initial choice is made. The other carrying network shall have rights of first selection in 1983 and 1984.

5. Once the foregoing scheduling has been completed, the Committee shall call a meeting of the two networks between March 15 and May 15, at which time each network shall select two games (hereafter called "equity games") to be telecast during that year's football season. The objective shall be to establish an equitable foundation of games chosen by each network for its schedule. The number of "equity games" to be selected at that time may be increased upon the separate agreement of each of the two networks and approval of the Committee.

The network which had the second selection of special dates shall select first in the equity draft. The two networks then shall alternate selections until the equity games have been selected. These selections shall be subject to the confirmation by the Committee as in the best interests of the membership and the stated purposes of this Plan.

The network first selecting a game on a date shall control the time sequence of the presentations on that date if a doubleheader is scheduled.

6. Immediately thereafter, the two networks shall choose through alternating selections the remaining dates of the series on which one or the other will have "control," i.e., first right of selection of game(s), authority to adjust game times to meet the provisions of Ground Rule 14 and the option of moving a game per Ground Rule 11. The network which had the last selection of equity games shall have first selection of a date from the remaining series dates and thereafter the selection of the remaining dates will be alternated between the networks. Games to be presented on these dates shall be picked on a weekly basis not later than 11:30 a.m. Eastern Time on the Monday of the week in which the game is to be played.

As with all other scheduling selections, choice of these games shall be subject to the approval of the Committee as consistent with the purposes of the Plan and the endeavor to achieve a balanced program for the two networks.

7. By May 15, if the selections made at this point have not provided one (or both) of the networks with two games in early September, the Committee may require the selection of an additional game or games on a September date on which the network has control in order to have early-season promotional opportunities.

Thereafter, selection of games to be televised will be made by each network on a weekly basis as provided above, according to the sequence previously established.

8. A Saturday afternoon exposure shall be available each week to each network. It shall not be a requirement that each network televise a game or games each week of the series, but at least one such telecast shall be required each week.

9. Those occasions on which regional or national exposures are to be presented shall be determined by the respective networks, so long as the annual requirements of the Television Plan for 14 exposures and 70 team appearance opportunities per network are satisfied. Each network shall present a combination of either seven national and seven regional exposures or eight national and six regional exposures per year, at its option. During a regional exposure, a network may televise from three to six games.

10. On a date on which it has first right of selection, a network may elect to present its game(s) early or late, regionally or nationally. Game times may be adjusted as required. The second network will utilize the remaining time slot, if each network is televising on that date, and may present a regional or national exposure, at its option.

If the network which controls the date (Network A) elects to present a regional telecast and Network B elects to present a national telecast, then Network A shall select one regional game first, Network B shall select its national game second and Network A then shall complete its regional selections.

If Network B elects to present a regional exposure, then the networks shall alternate selection of games, with Network A making selections 1-3-5-7 and Network B selections 2-4-6-8.

11. A network may move any game from any date on which it has first selection rights (including the special dates described in paragraph 4 above) to another date in order to strengthen its overall schedule. In such a case, the network which was to pick second on the date from which the game was moved then selects its game(s) for that date and controls the time; the other network then picks its game(s) for the date.

If a network which is to select second on a date wishes to move a game from that date to another date which it controls, it may do so at the time of its selection turn on the initial date. Right of next selection then reverts to the network which had first selection rights.

12. The release of any regional telecast shall be confined to not more than 65 percent of the nation's television households. Once during each two-year period of the 1982-1983 and 1984-1985 NCAA football seasons, each carrying network may request the Football Television Committee to approve a regional release pattern in which one of the regional games will be televised in an area comprising up to 75 percent of the television households in the 48 contiguous states; further, when special circumstances warrant, a carrying network may devise a regional release pattern deviating from the Committee's general policy of requiring coverage throughout the conference area of each team participating in a regional telecast, subject to the Committee's approval which will not be unreasonably withheld.

13. Each member institution shall be eligible to appear on the series of the two networks six times in each two-year period of the Plan, these six appearances to be divided equally between the two carrying networks. Within the six appearances, each such member shall be eligible to appear on four national and two regional telecasts in each two-year period, these four national and two regional appearances to be divided equally between the two carrying networks. Any appearance opportunity not utilized for a national telecast may be used in a regional telecast. Also, no member may appear on the network series more than four times during the first year of each two-year period of this Plan (twice on each network), nor more than five times during each such second year.

14. On those Saturdays when a doubleheader is scheduled, the pregame telecast of the first game shall begin at 12 noon Eastern Time and the kickoff shall occur between 12:20 and 12:35 p.m. The pregame telecast of the second game shall begin at 3:30 p.m. Eastern Time and the kickoff shall occur between 3:45 and 3:50 p.m. At the request of a carrying network, the Committee may adjust those times to further the interests of the program.

15. On dates on which only one network televises, it shall determine the telecast starting time, subject to the approval of the Committee if the time is an unusual time.

16. Scheduled overlaps between the two network telecasts will be permitted only after consultation with each network and only in special circumstances, e.g., situations where inadequate lighting makes it impossible to start the second game of the day (televised by the second network) at a late enough hour to assure that overlap will be avoided; dates when prominent baseball games will be televised, or on the Friday following Thanksgiving Day. Subject to each network's obligation to present 14 exposures, neither network shall be required to televise concurrently with a telecast of a baseball league championship playoff or World Series game. The committee

may authorize concurrent telecasts of series games on dates when such baseball games are televised.

17. Each carrying network shall be required to schedule in each two-year period of the Plan the games of 82 different NCAA member institutions. It is the Television Committee's goal that 115-120 different institutions appear on the two networks' schedules in two years. If, after the first season, it appears the two-year total will not reach 115, the Committee shall request the networks to attempt to schedule additional teams in the second year which did not participate during the first year.

18. When a network is presenting the early (12:35 p.m. Eastern Time kickoff) exposure of a doubleheader, for the regional telecast which will be released in the Pacific Time Zone only it shall be permissible for the network to schedule the release for kickoff at either 9:35 a.m. or 3:45 p.m. Pacific Time, even though the remainder of the regional exposure shall be released with kickoffs at 12:35 p.m. Eastern Time. If it believes it would benefit the series, the Committee may authorize such a Pacific Time Zone release for kickoff at 12:45 p.m. Pacific Time, even though it would thereby be competing with the late (3:45 p.m. Eastern Time) telecast of the other network. It is understood that if a game to be televised with a kickoff at 12:45 or 3:45 p.m. Pacific Time is played in another time zone, it also would be televised concurrently in its immediate area of interest. The Committee will monitor Pacific Time Zone presentations to determine whether due to this provision the members of any conference receive an excessive number of appearances on one or both networks and may prohibit selection by such network(s) of additional regional appearances confined to the Pacific Time Zone for such group of teams. It is understood that the times above set forth in this paragraph are representative of the permissible time spans for kickoffs provided in paragraph 14.

PLAINTIFFS' EXHIBIT 83

AGREEMENT

Agreement dated January 27, 1982 by and between TURNER BROADCASTING SYSTEM, INC. (Turner) and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (NCAA).

1. NCAA hereby agrees to grant to Turner the rights during the 1982 and 1983 football seasons for live or simultaneous cablecasting via WTBS-Atlanta within the United States, its territories and possessions of NCAA football games not selected for telecast by any television network which has contracted with the NCAA for the televising of the NCAA football series for 1982-1985.

2. The minimum aggregate compensation to be paid by Turner for such games shall be $7,408,000 for the 1982 season and $10,288,000 for the 1983 season.

3. During each such season Turner may cablecast 19 exposures consisting of 38 team appearances. A minimum of four such team appearances shall be for Division I-AA football institutions. The cablecasts hereunder shall consist of a single exposure televised on each of the 14 Saturdays from the first Saturday in September to the first Saturday in December, a single exposure on Thanksgiving Day, the night of Labor Day, and on three Thursday nights during the season selected by Turner.

4. The commercial time, commercial format and commercial limitations for each game cablecast shall be in accordance with the NCAA Football Television Plan for 1982-1985.

5. Each cablecast shall be in accordance with the format and appearance rules set forth in the attachments to the letter of Wiles Hallock to Terry Hanson, dated December 31, 1981.

6. This agreement is subject to:

(a) Subscription within 15 days from the date hereof by Turner of a detailed written contract which will include the foregoing provisions and other terms not inconsistent with the foregoing, conforming with the principles included in the April 17, 1981 letter of Wiles Hallock to James Frank, and the 1982-1985 NCAA Football Television Plan.

(b) The approval of such detailed written contract by a two-third vote of the members of the NCAA Council present and voting. NCAA agrees that if the Council fails to approve such detailed written contract, NCAA will give Turner in writing the specific objections of the Council and will negotiate in good faith with Turner in its attempts to cure such objections within five business days of Turner's receipt of such objections and will not grant such rights to any third party during such five day period.

TURNER BROADCASTING SYSTEM, INC.

By /s/ Robert J. Wussler
Executive Vice President

THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

By /s/ Walter Buyers
Executive Director

DEFENDANT'S EXHIBIT ZX-1

Expert Report of Dr. William M. Landes

in

The Board of Regents of the University of Oklahoma, et al. v. National Collegiate Athletic Association et. al.

June 9, 1982

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I. INTRODUCTION

I am an economist and I have done most of my professional work on questions concerning the economics of law, the legal system, and antitrust. I received my B.A. in 1960, and my Ph.D. in 1966, from Columbia University. I have taught at Stanford University, Columbia University, the Graduate Center of the City University of New York, and the University of Chicago. I am now the Clifton R. Musser Professor of Economics at the University of Chicago Law School, and I am also one of the principals of Lexecon Inc. I teach introductory economics for law students, economic analysis of law, and antitrust, and I serve as Co-Editor of the Journal of Law and Economics. My recent publications on antitrust topics include *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981) (with Richard A. Posner); *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. Law & Economics 331 (1980) (with Frank H. Easterbrook and Richard A. Posner); *Public Policy Toward Airline Mergers: A Case Study*, 11 Bell J. Econ. 65 (1980) (with Dennis W. Carlton and Richard A. Posner); and *An Introduction to the Economics of Antitrust*, in Richard A. Posner & Frank H. Easterbrook, *Antitrust* 1055 (2d ed. 1981). My curriculum vitae and a description of Lexecon Inc. are attached as Appendix A.

I have examined the plaintiffs' allegations and I have studied the NCAA practices challenged in this case. I conclude that the NCAA's football television controls are not anticompetitive and create no antitrust injury. I base this conclusion on my findings that the NCAA controls do not restrict output in the relevant television programming market and that the controls enhance in-stadium attendance.

My analysis of the effects of the NCAA's practices is based on economic principles that are set out in detail in Part II of this report. As I explain there, economists condemn monopoly and

cartels (price-fixing agreements among firms) because they reduce output in a relevant market below the competitive level and thereby create an allocative or deadweight loss. An important aid in determining if a practice by a group of firms is output-restricting is to determine whether the group has market power in a relevant market. Only if it has market power will it be able to reduce output below the competitive level. Conversely, if the group lacks market power, it will be unable to reduce output even if it adopts a practice that restricts its own output. Without market power other firms will increase their output in response to the output reduction of the group, thereby preventing both a decline in market output and an increase in price. In the latter situation there is no allocative or deadweight loss (and indeed there may be a gain if the practice leads to cost reductions or product improvement) and the economist would not consider the practice in question to be anti-competitive or price-fixing.

I also explain in Part II that the NCAA members produce two outputs whenever a football contest occurs: in-stadium attendance and a potentially televised football game. Therefore, the NCAA's television controls cannot be evaluated only by examining output in the relevant programming market because college football telecasts are only one component of a jointly produced product. One must also evaluate the effect on in-stadium attendance.

Part III describes the features of the NCAA's football television controls that are relevant to my economic analysis. I also explain in Part III why the minimum aggregate compensation provision of the NCAA television plan is not output-restricting, and how it avoids the possibility of network monopsony power.

Parts IV and V present my empirical analysis of the effects of the NCAA's football television controls. Part IV focuses on the question what is the relevant programming market in which

to evaluate these controls. Here I analyze program prices, the types of products that are advertised on college football and other programs, and demographic characteristics of viewers of both college football and other television programs. On the basis of my empirical analysis, I conclude that there are a large number of programs that are substitutable for college football on television and, therefore, that the NCAA's share of an appropriately defined market is too small for it to affect output in that market. In short, the NCAA lacks market power. Its television controls do not enable it to affect significantly either the market quantity of programs or viewers available for advertisers.

In Part V, I explain how the NCAA's football television controls enhance the other component of the product—in-stadium attendance at college football games. Using a statistical tool called regression analysis I find a reduction in in-stadium attendance (principally at Division II and Division III schools) when two college football games are televised compared to one on a given day in a particular section of the country.

In sum, the empirical analysis in Parts IV and V of this report lead me to conclude that the NCAA's television controls are not anticompetitive. They enhance overall in-stadium attendance, and do not reduce significantly the number of television viewers available to advertisers.

II. THE ECONOMICS OF COMPETITION AND MONOPOLY

I begin my report by outlining some of the central considerations that guide the economic approach to antitrust. I do so even at the risk of describing economic considerations that already may be familiar to the Court because these considerations are the foundation of an appropriate analysis of antitrust problems in general and, more important, are

fundamental to understanding the antitrust considerations posed by the NCAA practices challenged by plaintiffs in this case.

Antitrust economics is a part of a branch of economics called microeconomics, which involves the study of particular markets rather than the economy as a whole. In microeconomics, therefore, one does not make judgments about economic aggregates such as inflation or national income but asks, rather, how the resources available in particular markets or industries may be best used.

A. ASSUMPTIONS OF ECONOMIC ANALYSIS

Economists analyze behavior on the assumption that people act in a way that seeks to maximize their satisfaction, given the circumstances they confront and external forces that set limits on how they can act. In other words, economists assume that people do the best they can. Thus, consumers will buy those goods and services that maximize the satisfaction they derive from their purchases, given the prices they must pay and their available income. Similarly, owners of productive resources will try to sell these resources at the best prices obtainable given competition from other resources and the willingness of buyers to pay for them. Producers or firms will try to maximize their profits, which are simply the difference between their revenues and their costs.

The assumption that people try to do the best they can leads to certain predictable relationships in market transactions. The most important of these is that when the price of a good or a service increases relative to other prices, people will buy less of it. And when the relative price of a good or service decreases, people will buy more of it. For example, if the price of admission to football games rises relative to prices of other goods or services, some people may stop attending football

games altogether; others may go less frequently and instead go to the movies or watch more television. Consumers (or some of them) will, in other words, substitute one good for another when relative prices change. The process of substitution will continue until the purchaser finds that his last (marginal) football game attended yields as much satisfaction as he could obtain by spending the same amount of money on something else.[1] Similarly, when the price of a productive input (e.g., steel) rises, firms will tend to use less of that input as they substitute toward other inputs (e.g., aluminum or plastic). Again, this process of substitution will continue until the last unit of steel purchased by the firm yields as much revenue (per dollar of cost) as do other inputs.

The price of an item, whether a consumer good or a productive input, serves to allocate it to those buyers who value it most in relation to other things. This process of allocation ensures that resources move to their most valuable uses, i.e., the uses which give buyers the greatest satisfaction. When this process is unimpeded, it produces an efficient allocation of resources; i.e., one yielding the greatest available level of satisfaction from scarce resources.

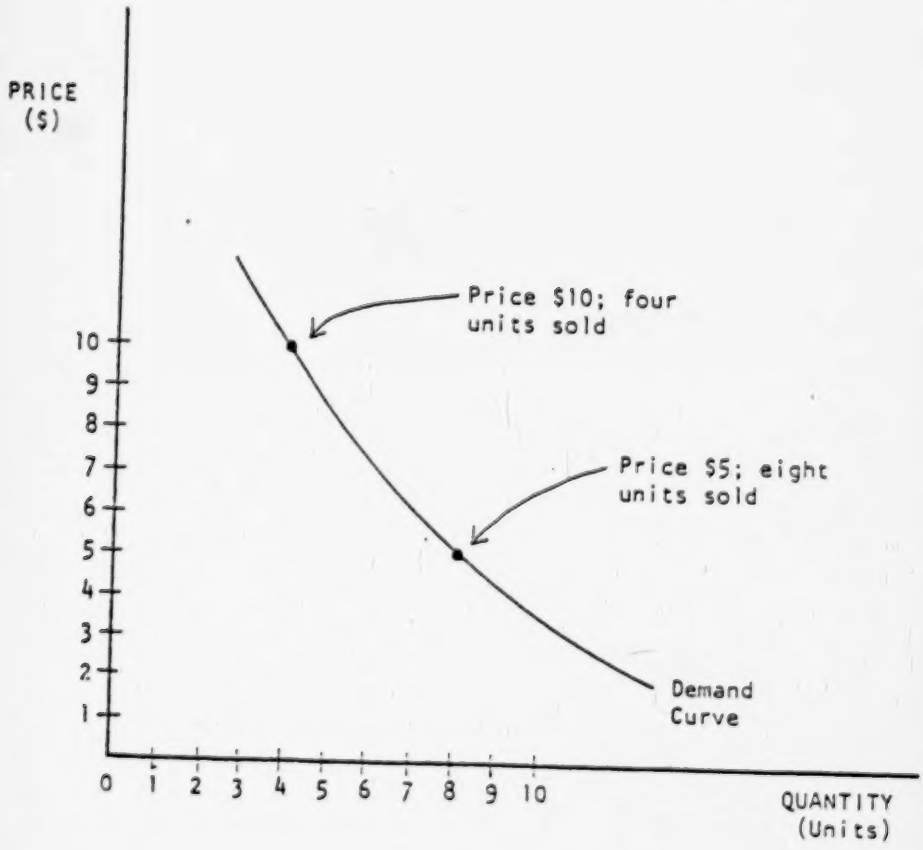
This process of substitution in response to relative price changes produces what is known to economists as the "downward-sloping demand curve." In a graph with price on the vertical axis and quantity on the horizontal axis, the economist will plot points showing how much is demanded at a given price. These points will show that more is demanded as

[1] The price of tickets is not the only cost. The fan must pay for gas, parking, and perhaps a baby sitter. He also values his own time, and will consider time-costs (he could be doing things other than driving and waiting in line) in deciding how much attendance really costs him. It is not essential to explore here the way these costs are considered; to simplify the presentation I assume that all costs have money equivalents.

price falls.[2] See Figure 1. The economist can determine, from knowing the price, what the quantity demanded will be, and he can determine price from observing quantity. When price rises, people demand less; and if the quantity available of a good falls, people will pay a higher price in order to obtain the available supply. This is a familiar observation in daily life. Higher meat prices lead people to substitute chicken; and when prices of cars rise, people keep their cars longer, thus buying in the aggregate fewer per year.

[2] A more formal description would add that price relative to a price index is on the vertical axis and quantity per unit of time is on the horizontal axis. In addition, certain things are held constant along the demand curve. For example, real income of consumers would be held constant along a demand curve for a final product.

Figure 1


PRICE
($)
10
9
8
7
6
5
4
3
2
1
0
1
2
3
4
5
6
7
8
9
10
Price $10; four
units sold
Price $5; eight
units sold
Demand
Curve
QUANTITY
(Units)

B. THE MODEL OF COMPETITION

Economists often use a model of markets known as "perfect competition." In this model, which is a simplified way of looking at markets, each firm in an industry acts as if it has a negligible effect on the price of the product it produces.[3] Thus, although the group of firms that makes up the competitive industry faces in the aggregate a downward-sloping demand curve (see Figures 1 and 2), each individual firm faces a horizontal demand curve. Since the competitive firm cannot affect the price of its product because it faces a horizontal demand curve, it will maximize its profits by choosing the level of output that makes its marginal cost (the cost of the last unit produced) just equal to the price it can obtain. Because every firm in the market makes the same calculation, the competitive industry will operate where marginal cost equals the price consumers will pay, and at that point there will be no incentive for anyone to make, or buy, any more or any less. This is a point of equilibrium.

---

[3] Just how many firms, and of what size, are sufficient for each to have a zero or negligible effect on price is an open question. Almost any firm will have *some* influence over price, if only because other firms cannot instantaneously respond to that firm's reduction in output. But the size necessary for a firm to have appreciable power over price will vary depending on the intensity of consumers' demand for the product, the ability of other producers to expand output, and the availability of substitutes. In some markets, the presence of even two firms would be enough to ensure that the market conforms to the model, and in others (where new firms could enter quickly) even one might be enough. A more complete discussion appears in William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981).

Figure 2

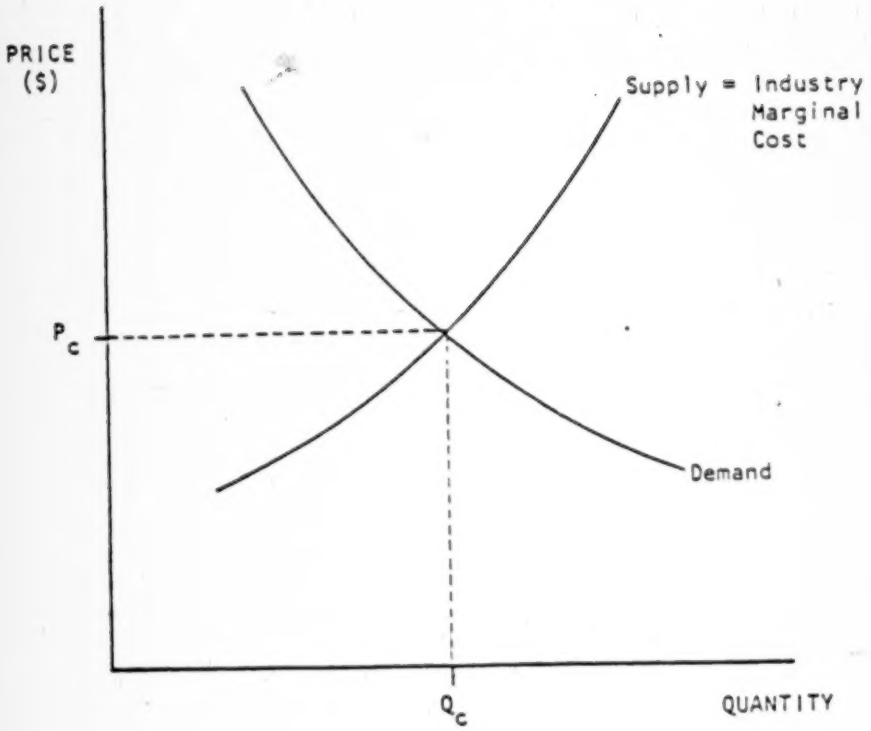


Figure 2 depicts the equilibrium in a competitive market. The curve showing the willingness of producers to supply more of the item (i.e., the industry supply or marginal cost curve) will in many cases slope upward to the right because, in order to make more, resources may be subject to diminishing returns or producers must bid more resources away from other endeavors that consumers also value. The price at this equilibrium will be P_c, and at this price consumers will buy Q_c units.

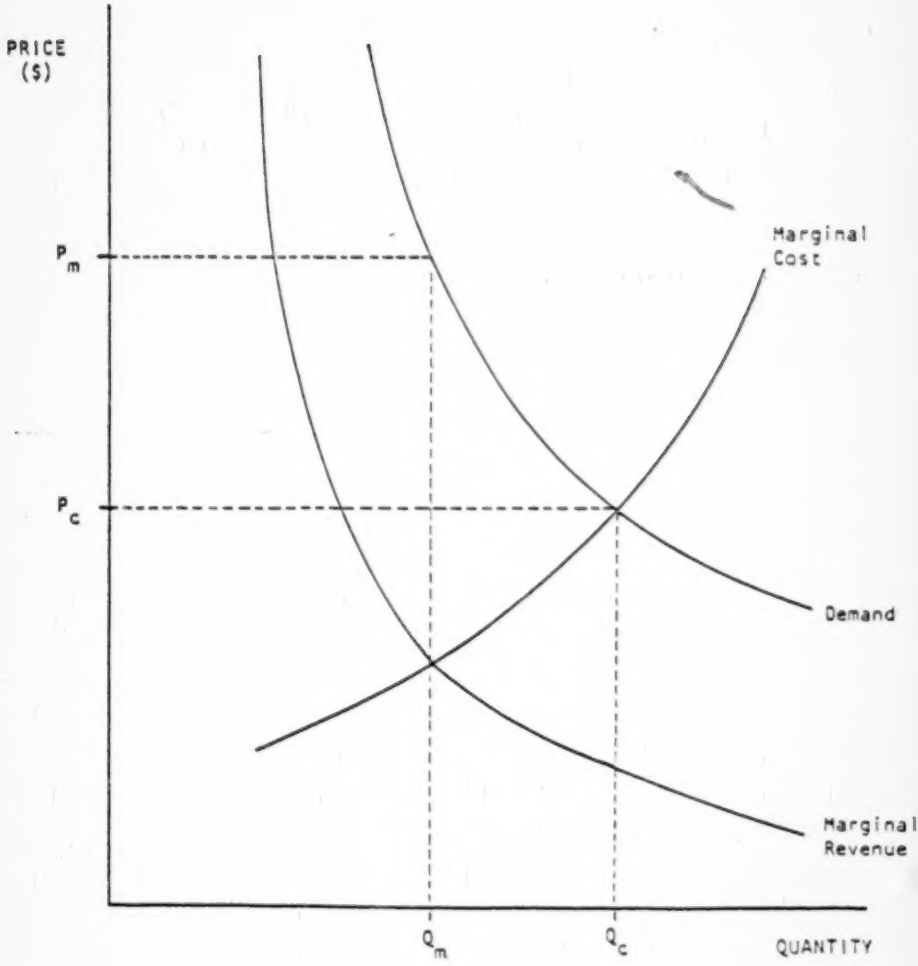
The competitive equilibrium is efficient. It will be recalled that each point on the demand curve represents the monetary value to consumers of the last unit demanded. Similarly, each point on the industry supply or marginal cost curve represents the cost of the last unit of output. Therefore, at the competitive equilibrium, where demand equals supply, the value of the marginal unit to buyers will equal the cost of the marginal unit to sellers. Any other output results in a lower total value to society and therefore is inefficient. For example, at a greater output, the additional cost exceeds the monetary value of the extra output; at a smaller output the value exceeds the cost of making more.

C. THE DIFFERENCE BETWEEN COMPETITION AND MONOPOLY

The competitive model does not fit all real-world markets. If a firm is a monopolist (or equivalently, if all of firms in a market form a cartel), the demand curve facing it will be the industry demand curve, shown in Figure 2. Therefore, the more this firm (or cartel) produces, the less it can charge; this is a necessary consequence of the fact that the demand curve slopes downward to the right. Moreover, if the firm (or cartel) charges the same price for each unit it sells, its decision to make an additional unit also reduces the price it can charge on all *earlier* units. The fall in the price means that this firm must take into account a new consideration, called marginal revenue. Marginal revenue is the amount the firm (or cartel) can make

by selling one additional unit, and it is computed by taking the price of the last unit sold and subtracting the revenue lost on earlier units because their price must be reduced. Marginal revenue, like the demand curve, slopes downward to the right, but the slope of the curve is steeper because at every quantity marginal revenue is computed by taking price (the point on the demand curve) and subtracting something (the reduction in revenue from earlier units). Figure 3 shows demand, supply, and marginal revenue curves together.

Figure 3


PRICE
($)
P_m
P_c
Marginal
Cost
Demand
Marginal
Revenue
Q_m
Q_c
QUANTITY

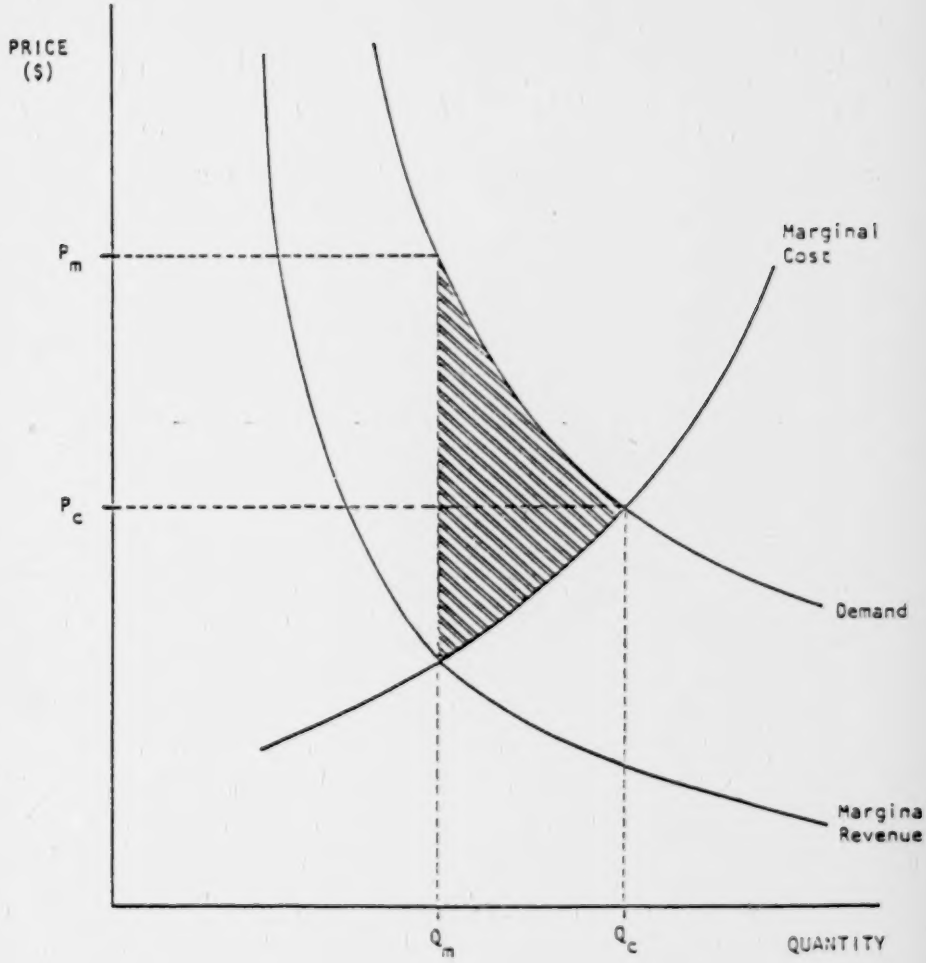
Any firm (or cartel) that faces a downward-sloping demand curve has some power over price in the sense that it can raise the market price above the competitive level by restricting its output. Such a firm (or cartel) maximizes its profits by producing up to the point where the marginal cost of making the last unit equals marginal revenue (the revenue derived from selling that unit). This is the same kind of calculation a firm makes in perfect competition, but because the monopolist or cartel (and not the competitive firm) affects price by changing its output, it finds that its profits are highest when its output is less than the output under competition. Thus, in Figure 3, a monopolist or cartel would find that marginal cost and marginal revenue are identical at point Q_m. If only this quantity is available, consumers will pay P_m for each item. Under competition, where price equals marginal cost, firms would offer Q_c of goods to consumers at price P_c. The monopoly output is less, and the monopoly price more, than the competitive price and output.

D. THE ECONOMIC OBJECTION TO MONOPOLY: RESTRICTING OUTPUT IN THE RELEVANT MARKET

Economists condemn monopoly and cartelization because of this change in price and output. Not that the change is objectionable in itself — there is no intrinsically "right" price and quantity of any item. Monopoly is objectionable, rather, because the reduction in output misallocates society's resources. In short, monopoly is objectionable because it is inefficient. Consider, as an example, the price of college football tickets. If college football is monopolized, or cartelized, ticket prices rise, and people substitute movies, television, and other things even though they could have obtained the same satisfaction, at lower cost in real resources, had they continued to go to college football games. Stated differently, monopoly makes it more costly to satisfy consumers' wants. Because resources are scarce, this extra cost leads to a lower level of consumer satisfaction.

Suppose, to take another example, that in Figure 4 the monopoly price of wheat, P_m, is $2 per bushel, and the competitive price, P_c, is $1. At the monopoly output, Q_m, the monopolist could supply additional wheat for say a marginal cost of $0.70 per bushel. One additional bushel would be worth $2 to consumers and would cost only $0.70 to produce. (That cost is less than the assumed competitive price of $1 because marginal costs will typically rise as output increases. And, as shown earlier, marginal cost will equal price at the competitive output.) The difference between the value of the wheat to the consumer and the cost of making it is lost. As output increases from the monopoly to competitive level this loss per unit decreases because the value of additional units to consumers declines and the marginal costs of making these units increases. The sum of these losses is called the "allocative" or "deadweight" loss of monopoly. The loss includes the entire area between the cost of supplying more wheat and the value consumers place on these units, from the monopoly output Q_m to the competitive output Q_c. The shaded area in Figure 4 represents this allocative or deadweight loss from monopoly.

Figure 4


PRICE
($)
P_m
P_c
Marginal
Cost
Demand
Marginal
Revenue
Q_m
Q_c
QUANTITY

The reason monopolies are objectionable to economists is not because the higher prices for monopolized goods mean more profits for sellers. In fact, the sellers' profits do not use up real resources. They are transfers of wealth in much the same sense that taxes are transfers of wealth from one group to another. Wealth transfers may be desirable or not on political grounds, but they are not the focus of the economic analysis of monopoly. A monopoly is objectionable from an economic standpoint because a reduction in output (which gives rise to an increase in price) creates a deadweight loss and, therefore, is inefficient.

The economist's insistence on achieving the competitive output in a market redounds to the benefit of consumers and thus to the benefit of society (which is, after all, just a composite of all consumers). Recent antitrust cases share this concern with efficiency. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689-90 (1978); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (*ASCAP*); and *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342-44 (1979). *ASCAP*, for example, explicitly refers to a cutback in output as the source of the objection to monopolies (441 U.S. at 9-10, 19-20, 22 n.40).

It is especially important to understand that a restriction of output that results in a deadweight or efficiency loss is the essence of the economist's objection to cartelization. There are situations (as discussed below) in which individuals or firms may agree on price but do not restrict output. In such situations the agreement may make possible an efficiency gain and expansion in output. Consequently, economists do not regard every agreement about price as "price-fixing" or cartelization. Only those that restrict output and create an efficiency loss are

condemned by economists.[4] Some examples illustrate this point.

Suppose a few lawyers in New York set up an office and begin to practice as a law firm without formally creating a partnership. Assume at the end of each year they divide up their collective revenues according to an agreed upon formula. Because neither the initial agreement nor the subsequent division of revenues are output-restricting, neither would be labelled cartelization by an economist. Indeed, the formation of the firm may result in increased efficiency and enhance competition.

Similarly, the composer/members of ASCAP and BMI established exceedingly complex formulae for dividing music licensing revenues among themselves but these agreements regarding revenue divisions do not restrict output and do not constitute what an economist would call price-fixing. In fact, the principal practice challenged by CBS in its recent case against ASCAP and BMI (*ASCAP, supra*) was the establishment of the blanket license in licensing musical performance rights, not the formulae for dividing revenues among members. Only a restriction in output of music performance rights (and not the agreement to distribute revenues among composers) could have conceivably led to an efficiency loss. I understand that in the *ASCAP* case the Supreme Court found that there

[4] Theoretically, it is possible for a cartel or monopolist to engage in perfect price discrimination in which a different price is charged for each unit of output so that there is no reduction in output. (In effect, the demand curve becomes the marginal revenue curve.) Some economists would conclude that perfect price discrimination does not create any inefficiency. Others conclude that it results in inefficiency or waste as firms struggle with one another to become the monopolist. *See, e.g.*, Posner, *The Social Costs of Monopoly and Regulation*, 83 J. Pol. Econ. 807 (1975). Perfect price discrimination, however, is merely a theoretical construction. In practice effective cartels or monopolies tend to restrict output and create dead-weight or efficiency losses.

was no restriction of output from the blanket license and consequently no *per se* violation of the antitrust laws. I also understand that the method of dividing revenues among the composer/members was not found to be price-fixing.

To consider a few entertainment examples, suppose that Bob Hope, John Denver, Barbara Streisand, and Neil Diamond agree to form a joint venture to create a series of television specials. Or suppose that two prize fighters (Holmes and Cooney) agree to a televised boxing match. In both situations the principals will undoubtedly agree on a division of revenues among themselves (and others such as their agents, managers, assistants etc.). Neither the formation of a joint-venture to produce the events nor the formula dividing revenue among the participants is output-restricting and neither would be regarded as price-fixing by an economist.

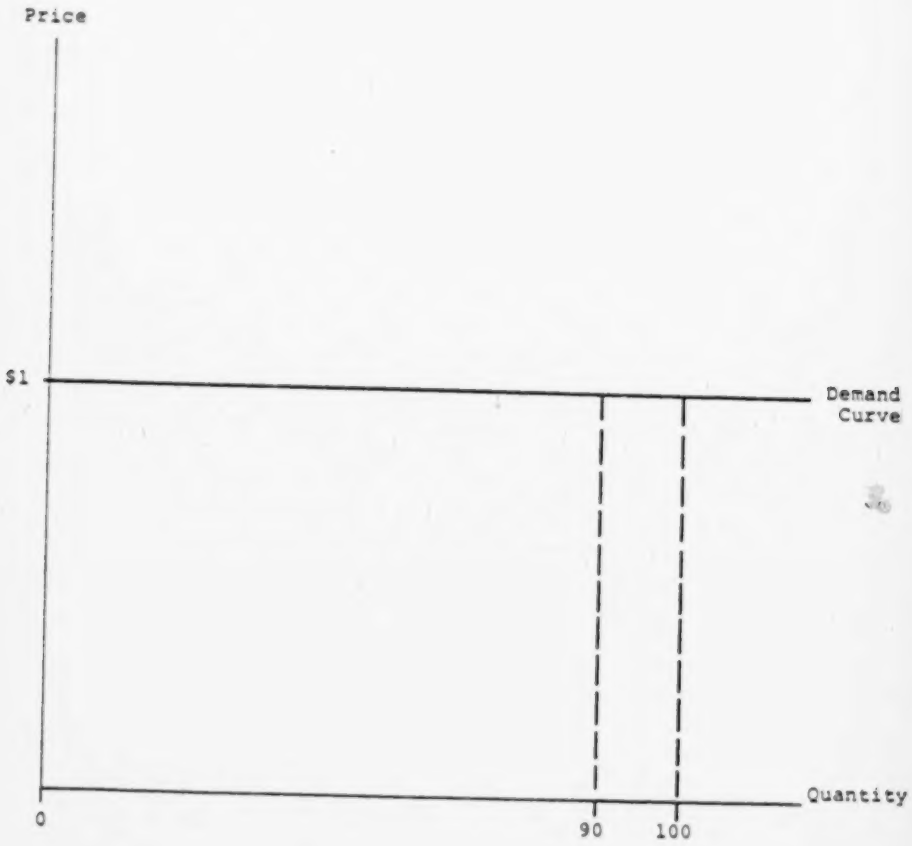
In short, from an economic standpoint it is necessary to determine whether a challenged practice is output-restricting before labelling it price-fixing or cartelization. This determination is called "characterization" in *ASCAP, supra,* at 19-20.

A key factor in determining if a practice of a group of firms is output-restricting is to determine if the firms jointly have market power. Market power, as I have written, ". . . refers to the ability of a firm (or group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." Landes and Posner, *Market Power In Antitrust Cases,* 94 Harv. L. Rev. 937, 937 (1981). If a group of firms without market power adopts a practice that restricts *its* output, output in the relevant market will not be reduced. That is, other firms will increase their output to offset any reduction by the first group of firms, and therefore price will not increase. Consequently there is no allocative or deadweight loss, and the economist would not consider the practice in question to indicate cartelization.

This last point is illustrated by the horizontal demand curve in Figure 5. Suppose a group of firms facing this demand curve was selling 100 units of output at a price of $1. Now let the group adopt a practice (e.g., coordinating the sales of individual firms through a common selling agent) that restricts its output to 90 units. Because the group has no market power, price will remain at $1 and consumers will not be injured. Differently stated, there is no reduction in output in the relevant market because there are a large number of substitute products that buyers can turn to, or because other firms are able to expand their output in response to the 10 unit reduction by the group. Moreover, since the group gains no monopoly profits by restricting its output, it is likely that the purpose of the practice was to achieve cost savings or to improve the quality of the product. In either case, the final result will be greater allocative efficiency.

The relevance of the above discussion to the NCAA's television controls should be clear. Because I show later that the NCAA lacks market power in the relevant television programming market, its television controls do not enable it to reduce output or raise price in that market. This finding is an important consideration in my conclusion that the practices challenged by the plaintiff in this case are not anticompetitive.

Figure 5



E. JOINT PRODUCTS

Joint products are products that are produced together through a single production process. A typical example given in economic textbooks is cattle raising, where two products, beef and hides, are produced as part of the process of raising steers.[5] College football telecasts and in-stadium attendance are "joint" products because the production of a live game produces both in-stadium attendance and another (potential) output, televised games.

There is, however, an important difference between college football and the beef-hide example. Unlike beef and hides, the two college-football products are linked in demand as well as supply—they are linked in both consumption *and* production. Thus, although some people may watch football on television but would not consider attending a game, others may consider attending a game as an alternative to watching football on television. And they would be less likely to attend games, the greater the number of college football games televised. Since colleges whose games are not televised rely on gate and related revenues to support their football programs, a diversion of their fans to television viewing would have an adverse affect on their football programs, and in the long run might threaten their viability.

For example, Oklahoma, Georgia and some other Division I-A teams may earn more revenue from televising college games than they lose from reduced gate attendance. When these teams are televised, however, it may adversely affect live attendance at other schools, whose gate losses are not offset by television revenues. In short, because of both the joint production of live and televised college football and the demand dependence between the two, the NCAA's television controls cannot be evaluated by examining only the output of televised

[5] Alchian and Allen, *University Economics* 2d (1968) 234-240.

college football — a single component of a jointly produced compound product. One must also evaluate the effect on attendance at live games.

III. THE NCAA PRACTICES CHALLENGED IN THIS CASE

The NCAA is a private, voluntary, non-profit association of about 900 colleges, universities and related associations. I understand that the NCAA regulates recruitment and compensation of college athletes, determines rules of play governing intercollegiate sports, preserves intercollegiate athletic records, conducts regional and national championships, and, in the case of football, regulates the television of games and negotiates network television packages of national and regional games involving NCAA members. It is this last function performed by the NCAA that is being challenged by two of its members.

It is my understanding that in 1951 the NCAA's annual convention appointed a committee to administer its football television program. The Television Committee experimented in 1951 with various ways of telecasting a series of college football games. In 1952, the Convention of NCAA Members voted for a resolution to authorize the NCAA's Executive Committee to again appoint a Television Committee that would propose a program of limited live television to be submitted to the membership for approval by a mail referendum vote of two-thirds of those voting. The resolution further provided that "no member institution of the NCAA shall make any commitments, arrangements or contracts for the televising of college football games for the 1952 season until the adoption of the approved plan and then only in conformity with the provisions of the approved plan."[6]

[6] NCAA, *Year-End Report of the 1952 NCAA Television Committee*, pp. 9-10.

The plan proposed by the 1952 Television Committee called for sponsored network telecasting of a series of twelve nationally televised games in 1952, with each member college restricted to one television appearance during the football season. An exception to the rule that only a single game could be televised on each Saturday was made for small-college games, which could be televised locally either in addition to or in place of a series game. The Television Committee negotiated a contract with NBC, and during the 1952 season 11 network games, 12 small-college games and 9 sell-out games were televised. Permission for sell-out game telecasts was granted where the Committee found that "no appreciable damage [would] be done thereby to NCAA program or member colleges."[7]

A summary of subsequent television contracts signed with different networks appears in Table 1. The total number of televised games has increased gradually over the years, and the maximum number of appearances by a single team has varied between one and two per year. Several provisions were added over the years to guarantee greater television exposure to the Division II and III teams that otherwise would not have been selected for network exposure. For example, the 1966 contract required the networks to televise Divisions II and III championship games and the 1976 contract required a minimum number of regular-season telecasts of teams in these divisions. One change in NCAA television policy occurred in 1982 when for the first time contracts were signed with two networks, and each acquired the rights to televise 14 exposures (nationwide television coverage) consisting of at least 35 games during the season, in addition to certain Division II and III regular season games and NCAA Division I-AA, II and III football championships. Also, in 1982 for the first time a supplementary series of 19 games will be cablecast nationally.

[7] Article VII, NCAA Football Television Plan for 1952.

The NCAA Television Plans allow exception telecasts and cablecasts whereby a game not telecast by the network can be telecast or cablecast in one or more local areas of particular interest. The sell-out exception permits a game to be telecast or cablecast in the home television market of both the home and visting institutions providing the game is sold out and no appreciable damage is done to any game played near the telecast site.[8] The 400-mile exception permits a game played at least 400 miles from the visiting team's campus to be telecast or cablecast to that campus in the absence of appreciable damage. Division II and III games may be televised or cablecast on a maximum of five stations without regard for appreciable damage to concurrently played games. Games may be telecast on Friday nights, Saturday nights, or Saturday afternoons and holidays when no series telecast is presented in four markets in the NCAA district or districts represented by the participating institutions, providing no appreciable damage is inflicted. Games involving Division I teams not televised by the network for at least eight years may be telecast in several markets without regard for appreciable damage to other games. Sellout games may also be telecast by the home institution's educational television station; closed circuit telecasts on campus are permitted without regard for appreciable damage and are permitted off-campus with regard for appreciable damage to conflicting games and the network series. Finally, exception game presentations on cable and subscription television have been permitted by the NCAA for several years. Table 2 presents a tabulation of the games cablecast or telecast under the NCAA's exception provisions during the last two years.

[8] The definition of appreciable damage differs depending on the type of technology used to telecast the game. For VHF transmission, appreciable damage is considered to be created by the existence of a concurrently-played non-televised game within a 120 mile radius of the transmitter. The protection area is reduced to a 45 mile radius for a UHF transmission. All concurrently played games are protected, including high-school, NAIA and other college games for which admission is charged.

Table 1

Summary of NCAA Contracts for College Football Television

Contract Period	Number of Games (Exposures)	National/ Regional Telecasts	Maximum Number of Appearances per Team*
1952	12	12/0	1
1953	13	10-11/2-3	1
1954	13	13/0	1
1955	8 (plus 5 local)	6/2	1 nat'l & 1 local
1956	8 (plus 5 local)	7/1	1 nat'l & 1 local
1957	9 (plus 4 local)	7/2	1 nat'l & 1 local
1958	9 (plus 4 local)	7/2	1 nat'l & 1 local
1959	10 (plus 3 local)	8-9/1-2	1 nat'l & 1 local
1960-61	13	9/4	1 nat'l & 1 reg'l
1962-63	14	9/5	1 nat'l & 1 reg'l
1964-65	14	9/5	1 nat'l & 1 reg'l-3/2 yrs.
1966-67	14	8/6	1 nat'l & 1 reg'l-3/2 yrs.
1968-69	14	8/6	1 nat'l & 1 reg'l-3/2 yrs.
1970-71	18	12/6	1 nat'l & 1 reg'l-3/2 yrs.
1972-73	19	12/7	1 nat'l & 1 reg'l-3/2 yrs.
1974-75	20-23	14/6-7	1 nat'l & 1 reg'l-3/2 yrs.
1976-77	20-24	13/7	1 nat'l & 1 reg'l
1978-81	23-24	13/10	1 nat'l & 1 reg'l

* Beginning in 1968 a team could appear one additional time every two years in the wild card game. The figures above do not include this wild card appearance.

Source: Annual *NCAA Television Committee Reports*, 1952-1981.

I understand that the aspects of the NCAA's television policies being challenged in this case are compensation and output provisions of the NCAA's controls. Each NCAA network contract (except the most recent) conferred exclusive rights on a single network to televise college football games played by all NCAA members, subject to the provisions for exception telecasts previously described. The 1982 controls, which cover the 1982 through 1985 seasons, provide for two networks to televise college football games. These contracts have provided that the network (or networks) selected would pay to the colleges whose games were televised a specified "minimum aggregate compensation." Between 1982 and 1985 this minimum aggregate compensation will be $131.75 million from each network and $7.4 million for the supplementary cable series. The division of this minimum aggregate compensation between the televised teams has never been specified in the NCAA's contracts which provide that each participating host college will negotiate the price and other terms of the telecast. The contract specifies the minimum and maximum number of telecasts permitted each year.

Table 2

Number and Type of Games Telecast or Cablecast Pursuant to the NCAA's Exception Procedures in 1980 and 1981

Exception	1980	1981
Division I		
400-Mile		
Telecast	41	41
Cablecast	4	3
Sellout		
Telecast	15	21
Cablecast	10	7
Division II and III		
Telecast	4	17
Cablecast	0	3
Closed Circuit	11	17
Special Night and Division I Exceptions	4	4

Source: 1980 and 1981 *NCAA Television Committee Reports.*

A. MINIMUM AGGREGATE COMPENSATION

An economist views the minimum aggregate compensation provision as a necessary accompaniment to the assignment of exclusive television rights. If the NCAA assigned exclusive rights to a single network and allowed that network to negotiate unilaterally with each school whose game it desired to telecast, the network would behave as a monopsonist[9] and the schools would receive no or little compensation for their television appearances. If, for example, the University of Oklahoma demanded more than a nominal fee from the network for permission to televise its game, the network could telecast another team playing that day, while Oklahoma would have no other potential buyer for its game. If televising a game were costly to the school involved, the minimum price that school would accept would equal these costs. However, this cost is virtually zero once the decision to play the game has been made.[10] This is an aspect of joint production discussed earlier. Therefore, a network able to choose among many schools already playing football games could avoid compensating teams for the rights to their games if there were no required aggregate minimum compensation. This provision permits individual schools which are chosen for television to capture some of the value of these games.

For the network and its affiliates, a game is valued by the amount of advertising revenue it generates. Without the minimum aggregate compensation provision the same number of games might be televised initially and the network and its

[9] A monopsonist is a single buyer facing a large number of sellers. A standard textbook example is a company in a one-company town facing a large number of potential employees who can sell their labor only to that company.

[10] An additional cost to the school would be the possible loss of gate and related revenues. There may be offsets to this cost such as greater alumni giving or improved recruiting.

affiliates would receive from advertisers the same amount of money. If the schools received little compensation, however, their incentives to develop high-quality football programs could be reduced and the quality of football could decline significantly. Eventually the network may not be able to find as many high-quality games as it can today. By stipulating a minimum aggregate compensation, the NCAA insures that its member teams get a share of the revenues generated by telecasting college football.

A final point is worth noting. The distribution of television revenues between the networks and the NCAA members is not relevant to an antitrust economist, because it involves a transfer of income from one group to another but has no effect on output in the relevant market—television programming. Similarly, the particular way in which the minimum aggregate compensation is divided between NCAA members is also irrelevant because it is not output-restricting.

IV. THE NCAA LACKS MARKET POWER IN THE RELEVANT PROGRAMMING MARKET.

In this section I examine the question does the NCAA possess market power in the relevant market in which it sells rights to telecast college football games.[11] The plaintiffs allege that the telecasting of college football games constitutes an economically distinct product market and that in this market the NCAA has market power. In order to evaluate this claim, it is essential to first explain briefly the economics of the television industry.

A. THE ECONOMICS OF THE TELEVISION INDUSTRY

The television industry consists of five major participants: stations, networks, program suppliers, viewers, and adver-

[11] The following analysis applies only to advertiser-supported television.

tisers.[12] Networks act as brokers between affiliated stations, which show both network and non-network programs, and advertisers, whose purchases of television advertising time generate revenue for the networks and their affiliates. Networks select programs that are telecast by affiliates and that are offered to advertisers for presentation of their advertising messages. Programs are not bought because of any intrinsic value they may have but because they generate television audiences, which the networks then "sell" to advertisers. Advertisers are willing to pay a price to reach viewers, which they do by buying advertising time. The price of that time depends on the size (and composition) of the audience that the program is expected to reach.[13]

The networks acquire programs from countless sources: major film studios, major and minor independent producers, advertisers, sports leagues and the networks' own production. The NCAA is one such supplier, although the networks actually produce televised college football. The supplier of one type of program (e.g. college football) to a network can only have market power if that program type has such special characteristics that it in turn confers market power on the networks vis-a-

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[12] A sixth participant, the Federal Communications Commission, is not considered because it is not relevant to my analysis. For a survey of the economics of the television industry *see, e.g.*, Bruce M. Owen, Jack H. Beebe and Willard G. Manning, Jr. *Television Economics* (1974) at 6.

[13] The price advertisers will pay is also determined by their opportunities for advertising through other media (radio, newspapers, magazines, etc.). (Bruce M. Owen, *Newspaper and Television Station Joint Ownership*, 18 Antitrust Bulletin 787 (1973).) It should be stressed at this point that while I do not explicitly discuss substitutability between media again, I am *not* stating that there is necessarily an advertising market limited only to television for antitrust purposes. In 1981 network television advertising accounted for only 9.1 percent of all advertising expenditures (*Advertising Age*, March 22, 1982, at 66), and studies have shown that advertisers substitute between media based on price.

vis advertisers. Thus, suppose that the quantity of one program type—e.g., college football games—is reduced. Then the networks will pay a higher price per game only if advertisers cannot find good substitutes for that program type. If other programs are available to the networks that deliver, roughly, the same size and quality audience, then any attempt by a program supplier to reduce the number of episodes or games it offers will cause the network to purchase other program types. Advertisers will be indifferent as to whether a college football game or other program type is telecast as long as the benefits from advertising are unaffected.

This fact, which is crucial to my analysis, can be made clear by referring again to a wheat farmer (discussed above in Part II) who cuts back his output but is unable to increase the price that he receives for wheat because he has no power to restrict the *aggregate* supply of wheat in the relevant market. In the case of the NCAA, the product ultimately offered to the networks (and advertisers) is the aggregate number and composition of viewers. If advertisers can reach viewers with roughly similar characteristics by running commercials during other programs (instead of during college football games), any attempt by the NCAA to limit output—i.e., restrict the number of games that can be televised—would not succeed in reducing viewership and thus would not result in a higher price per game. Only by significantly increasing *total* television viewership, or by generating an audience with more desirable characteristics for advertisers, can a program type constitute a relevant product market.

In this context, one must distinguish between a program that increases the audience of a single network and one that increases the total television audience. The fact that a program attracts a large audience does not necessarily confer market power on a supplier of that type of program. If these viewers are mainly "diverted" from other programs, total television viewership will be largely unchanged. *Total* television advertis-

ing revenues (or total advertising revenues) also will be unchanged since the price that advertisers are willing to pay is influenced by the number (and quality) of viewers that they expect to reach. In short, a program supplier can exercise market power only if its program significantly expands (or improves the demographic characteristics sought by advertisers of) the total television audience.[14]

B. THE RELEVANT PROGRAM SUPPLY MARKET

I have performed several studies that lead me to conclude that college football telecasts do not constitute a relevant product market. Rather, they are part of a much broader market in which the NCAA's share is too small to warrant the inference that the NCAA has market power. I review below these studies.

1. The Price of College Football Television Rights.

The traditional monopoly model discussed in Part II predicts that because a monopolist faces a downward-sloping demand curve the price of its output is related negatively to the amount of output he sells. As a first step, I would expect that if the NCAA had market power in the sale of television rights, the price received by the NCAA for each NCAA advertising minute would have declined over time as the number of games and hence advertising minutes increased.

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[14] The observation that some programs (appear to) earn considerable economic rents should not be interpreted as indicating that their producers could exercise market power. The cost of a 30-second commercial spot during a successful program will indeed be greater than that of a spot during a program that attracts fewer viewers. Accordingly, the networks will pay a correspondingly higher price for the rights to broadcast this program. These payments will represent economic rents.

Table 3 shows that as the number of minutes offered advertisers during college football increased from 208 to 506 between 1960 and 1978 the price received by the NCAA for those minutes did not consistently decline. The third column shows the price per minute deflated by the consumer price index. From 1960 to 1970 the price per minute rose significantly despite a 56 percent increase in the number of advertising minutes allowed by the contract. After 1971, the price per minute fell moderately but in 1978, when the largest number of minutes were added to the contract, the price per minute rose again. This pattern suggests that the NCAA has no ability to raise the price it receives by restricting output.[15]

[15] Factors other than the number of games televised per year will also influence the price per minute of advertising. A complete analysis of the relationship of price per minute and number of games would take these factors into account.

Table 3

The NCAA Television Contract Price Per Advertising Minute Allowed Under the Contract 1960—1981

Contract Period	Number of Total Advertising Minute Delivered under contract	Contract Price Per Advertising Minute*	Contract Price Per Advertising Minute Deflated by CPI**
1960-1961	208	15.0	19.8
1962-1963	224	22.8	29.2
1964-1965	252	25.9	32.4
1966-1967	270	28.9	34.4
1968-1969	306	33.3	37.0
1970-1971	324	37.0	37.0
1972-1973	361	37.4	34.6
1974-1975	400	40.0	31.5
1976-1977	420	42.9	29.2
1978-1979	506	57.3	34.1
1980-1981***	506	61.3	28.6

Source: NCAA Television Committee Reports

* The units for this series are thousand of dollars.

** The units for this series are thousands of 1970 dollars. Only the deflated price in the first year of the contract is presented.

*** The 1978 contract covered the years 1978-1981. However, the contract price was higher in the last two years of the contract.

2. Program Prices: College Football and Other Programs

If two products are in the same product market, their prices will tend to move together. Indeed this criterion has often been used in antitrust litigation to address the problem of market definition. Figures 6 and 7 show the relation between the price paid by the network for a college football "telecast" and the price paid by the networks for all their programming.

Figure 6 plots the NCAA contract price per game for the period 1960 through 1979 against the total program and technical expense of the networks and TV stations as reported in the Annual Reports of the FCC. Both series are in index form. Because the number of hours of total programming has remained approximately constant since 1960, changes in programming expense over this period are primarily the result of changes in the "price" of programming. This series therefore is a good proxy for the overall price of programming. The two series appear from Figure 6 to move almost in lock step, but this may result because nominal (non-deflated) prices often move together during periods of rapid inflation. Figure 7 presents these series on a deflated basis. Again the two prices move together closely.[16] Thus after eliminating the effect of inflation the prices of all television programs are closely related to the price of NCAA college football telecasts. This is consistent with the hypothesis that NCAA football is part of a much broader television programming market.

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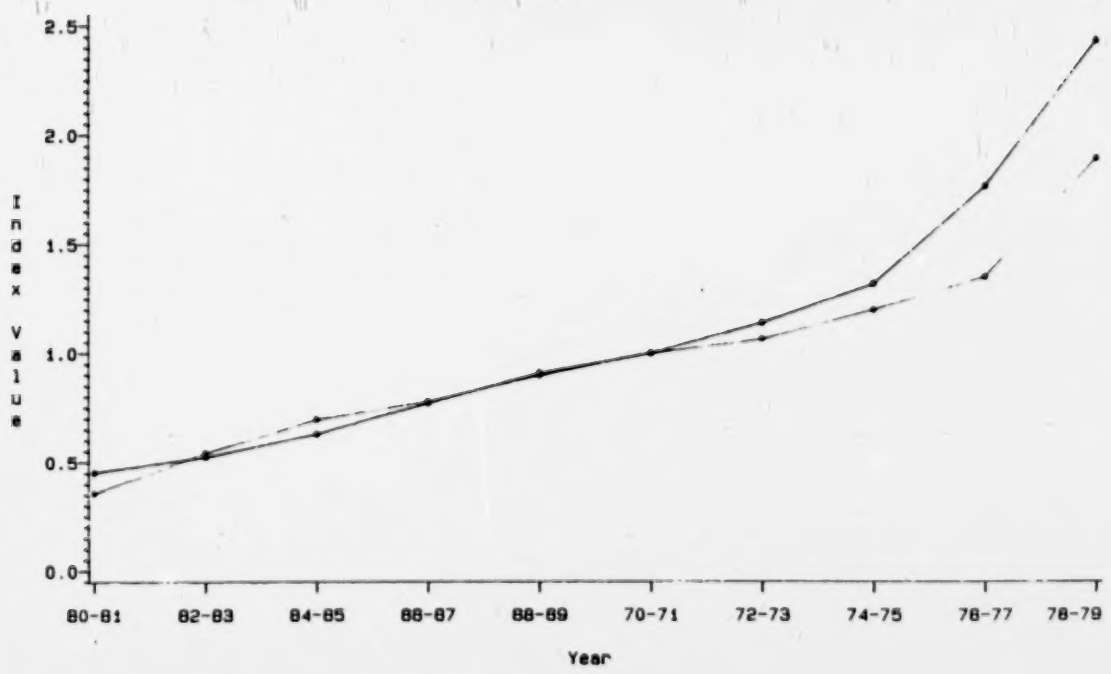
[16] The correlation coefficient between these two deflated price series is .758 for the period 1960-1979. This is significantly different than zero at a 99 percent confidence level. Between 1960 and 1977 the NCAA and networks negotiated contracts for two-year periods. In nominal terms, the price received by the NCAA was the same in each of the two years. The correlation coefficient was calculated using two-year averages for program expense.

Figure 6
Index of NCAA Contract Price Per Game vs. Index of Network and TV Station Program and Technical Expenses

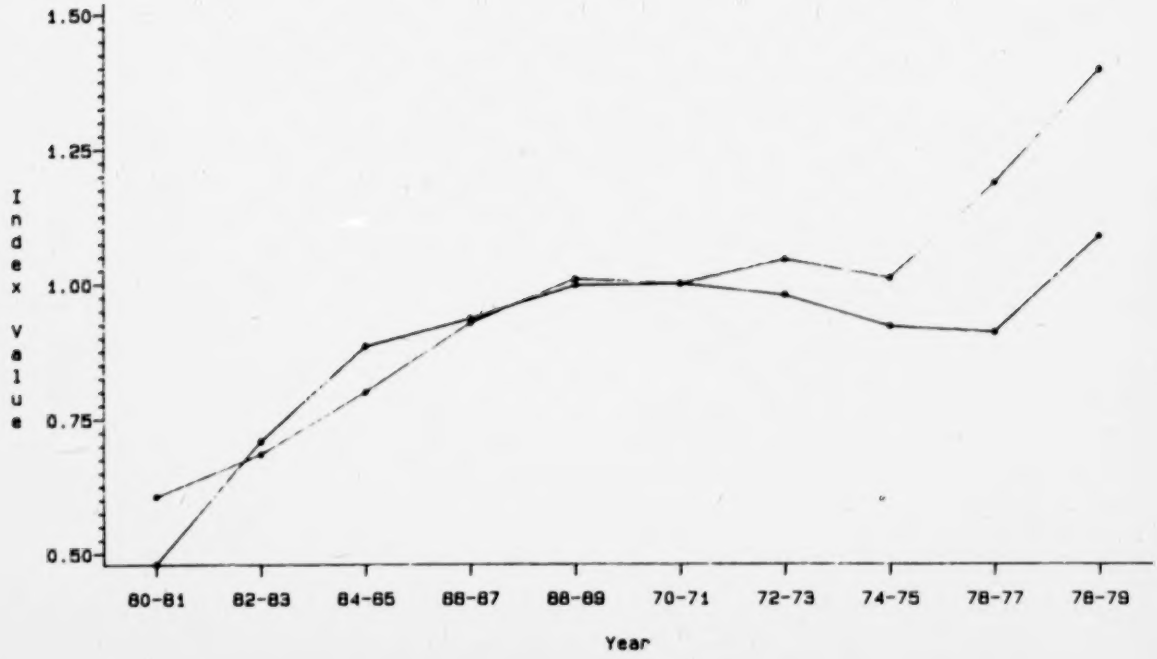
1960-1979



Note: Index of NCAA Contract Price is in blue
Index of Program and Technical Expenses is in red

Figure 7
Index of NCAA Contract Price Per Game Deflated by U.S. CPI vs. Index of Network and TV Station Program and Technical Expenses Deflated by U.S. CPI

1960-1979



Note: Index of NCAA Contract Price is in red
Index of Program and Technical Expenses is in blue

3. Products Advertised On NCAA Telecasts

I have shown already that advertisers are the consumers who could be injured by a reduction in output in the relevant programming market. I now study the advertisers and products advertised on college football telecasts. If these advertisers have sufficient substitutes available to them, televised college football is not a relevant programming market.

Suppose a group of firms is highly specialized to a particular input that is essential to each firm's production of output—i.e., from the firm's standpoint there are no adequate substitutes for this input. Subject to two important qualifications discussed below, this input may be a relevant product market because its sellers (assuming they acted jointly) could exercise market power by restricting the quantity available of that input. The two qualifications are (a) that the expenditures of specialized buyers of the input comprise a substantial fraction of total expenditures on this input; and (b) that other input suppliers do not have the ability to divert their capacity to produce the input in question if existing sellers restricted its quantity.

To explain, if (a) does not hold, then buyers who find this input essential are protected from the exercise of market power by other buyers who do not regard it as essential. That is, the market demand for the input, say x, will be highly elastic because a sufficient number of buyers will substitute towards other inputs in response to any attempt by suppliers to restrict quantity and raise price. Their ability to substitute, in turn, will deter suppliers of x from restricting quantity in the first place. Hence, the firm supplying x would lack market power, and the relevant market would include x plus substitute inputs.

Similarly, if (b) does not hold (even assuming (a) does), the suppliers of x will be unable still to exercise market power. Other suppliers will begin to produce x which will offset the reduction in x brought about by the original suppliers. Once

again the relevant market would include not just the sales of the original suppliers but the capacity of other firms to product that input.[17]

The above analysis suggests that televised college football might be a relevant product market if purchasers of advertising on college football telecasts are highly specialized to college football. If they were, one might infer that they did not have adequate substitute programs on which to advertise their products, and hence the NCAA could exercise market power by restricting the number of games televised.[18] This suggests that a necessary condition for college football telecasts to be a relevant market is that advertisers spend a large share of their total network television advertising on products that are advertised on college football telecasts. If network advertising on NCAA telecasts is only a small fraction of the television advertising of these products, however, I infer that these advertisers have numerous substitute programs on which to advertise. Then, college football would not be a relevant product market.

To examine whether advertisers who buy NCAA network spots are highly specialized to NCAA college football telecasts, I analyzed the 1981 Broadcast Advertisers Reports, Inc. (BAR) Network TV Summary. The BAR Summary (which was supplied to Lexecon on computer tape) is a compilation of network spots purchased on each network program in 1981 identifying both the advertiser and the product advertised. The BAR Network TV Summary allows one to determine how many network spots were purchased by an advertiser, by product, by program type and even by program. For example, one can measure the number of network spots purchased by

[17] This point is discussed more fully in Landes & Posner, *supra*.

[18] Still, if other program suppliers could develop substitute programs for these advertisers if the NCAA restricted its output, then the NCAA television controls would not give it market power, and NCAA football telecasts would not be a relevant market. This is simply an application of point (b) above.

Anheuser Busch, brewers of Budweiser, Busch, and Michelob beer. One can also compute the number of such spots purchased by program type and by program. And, since the BAR data also are organized by product, one can determine how many Anheuser Busch spots were Budweiser beer spots and how many were Michelob beer spots. In the case of Anheuser Busch's network television spots for example, only 2 percent were aired during NCAA football games and 76 percent were aired in non-sports programming. This implies that only 9 percent of Anheuser Busch's network sports television spots were shown during NCAA football games.

My analysis of the BAR Network TV Summary shows that even advertisers who buy NCAA network spots are not specialized either to NCAA college football games or to sports programs. The average advertiser who purchased network spots during NCAA football games in 1981 purchased only 5 percent of its total network television spots during NCAA telecasts. That advertiser placed over 75 percent of its network advertising in non-sports programs. In short, even for those advertisers who advertised on NCAA telecasts, other sports programs and other non-sports programs are by far the predominant method of television advertising.

The BAR data can be analyzed also on a "product" basis (thereby breaking down an advertiser's network spot purchases among sub-classes of its products). For example, General Motors purchased 7 percent of its network television spots on NCAA telecasts, while one of its products, Chevrolet Trucks, was advertised 13 percent of the time during NCAA telecasts. The average product advertised during NCAA college football had only 7 percent of its total network television spots aired during NCAA telecasts and 34 percent on network television

sports.[19] Thus, the average product advertised during NCAA telecasts was advertised 66 percent of the time on non-sports programs. These results are summarized in Table 4 below.

Table 4

The Average NCAA Advertiser's Distribution of 1981 Network Television Advertising By Advertiser and Advertised Product Classifications

	Percent of Network Television Advertisements In NCAA Football Telecasts	Percent of Network Television Advertisements in Sports Programs	Percent of Network Advertisements in Non-Sports Programs
Advertiser Method	5.18	24.37	75.63
Advertised Product Method	7.47	34.36	65.64

Even for those advertisers and products accounting for the bulk of network spots on NCAA telecasts, the percentage of network spots aired on other sports programs and on other program types is striking. Figure 8 presents the network spot purchases of the 20 advertisers who buy the greatest number of NCAA network television spots. These advertisers in aggregate accounted for 74 percent of the NCAA's network spots. As Figure 8 shows, even relatively large purchasers of NCAA spots bought the bulk of their television network advertisements in other programs.

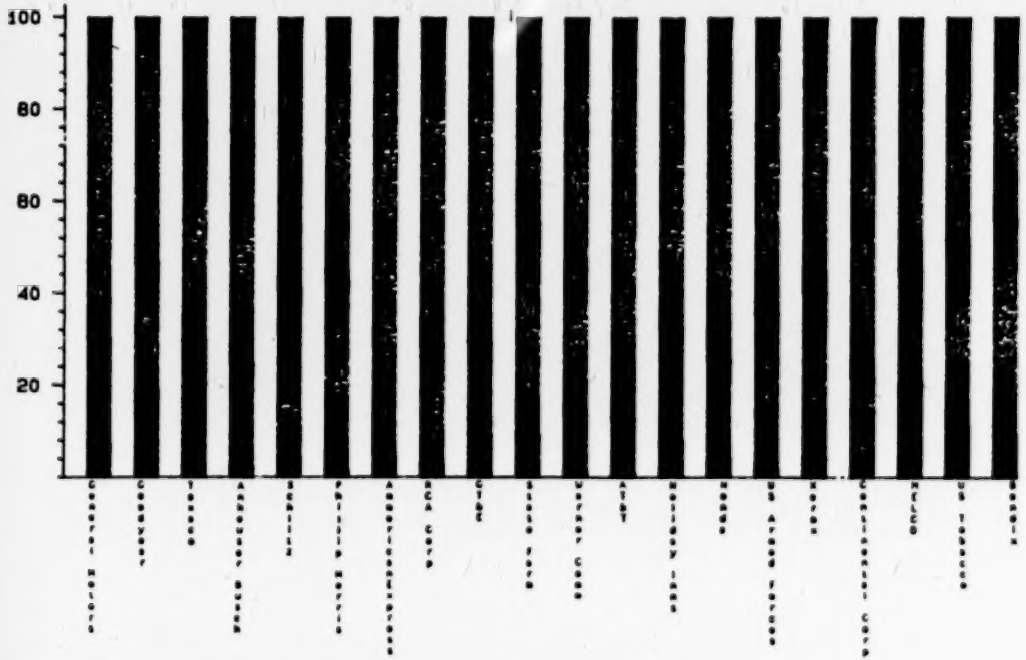
[19] These classifications are made in BAR and in some cases include a range of products. For example, BAR classifies Delco parts as a "product" even though that classification presumably includes batteries, spark plugs, etc.

Figure 9 presents a similar chart for the 20 products (as designated by BAR) accounting for the greatest number of NCAA spot purchases (62 percent of all NCAA network spots). I find here that products with the greatest number of NCAA network spots are broadly diversified across other sports and non-sports programs. For example, in 1981 Chevrolet Trucks were advertised in 43 NCAA network spots (13 percent of Chevrolet Truck's total network television advertising); 179 non-sports network television spots (56 percent), and 102 network spots other than NCAA football (31 percent).

As Figures 8 and 9 demonstrate, even those advertisers and advertised products accounting for the greatest number of NCAA network television spots are not specialized to NCAA college football telecasts. As explained above, this suggests that advertisers do not regard the NCAA college football telecasts as unique or distinct product market.[20]

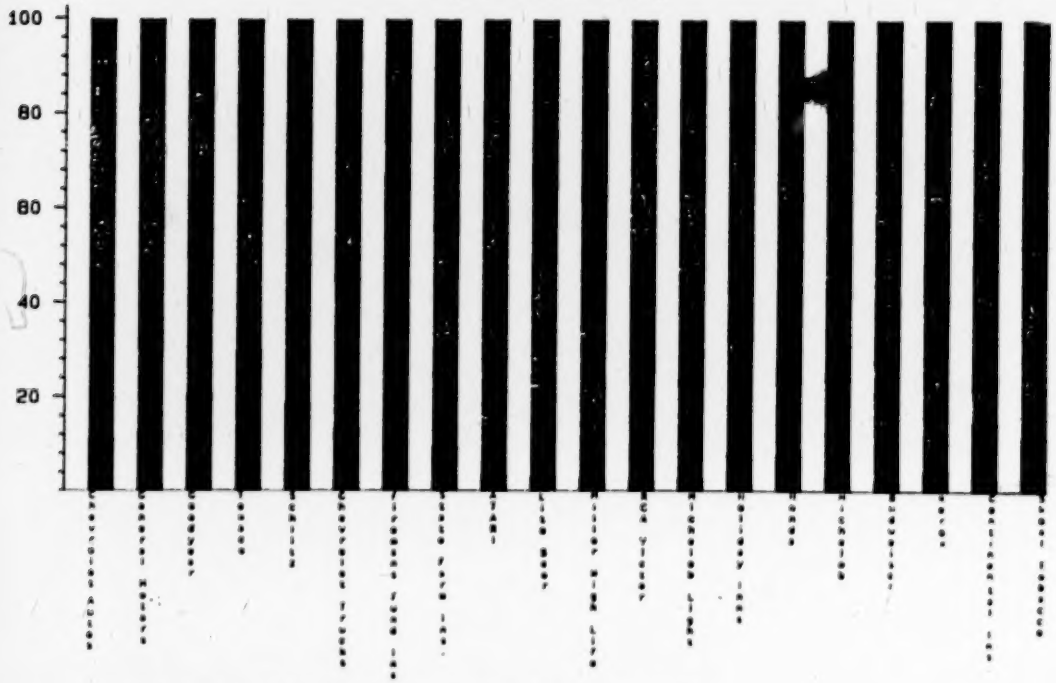
[20] Appendix B presents a detailed listing of the advertisers and products advertised during NCAA network telecasts compiled from the BAR Reports along with the percent of network spots purchased in sports programs and non-sports programs. These tables demonstrate conclusively that advertisers are not specialized to NCAA college football telecasts.

Figure 8
Percent of Network Spots Placed by Top 20 NCAA Football Advertisers in NCAA Football Broadcasts, Other Sports Programming, and All Other Programming (Advertiser Method)



Note: Share of advertising placed in NCAA Football telecasts is in red
Share placed in other sports telecasts is in green
Share placed in non-sports telecasts is in blue

Figure 9
Percent of Network Spots Placed by Top 20 NCAA Football Advertisers in NCAA Football Broadcasts, Other Sports Programming, and All Other Programming (Product Method)



Note: Share of advertising placed in NCAA Football telecasts is in red
Share placed in other sports telecasts is in green
Share placed in non-sports telecasts is in blue

One final point is worth mentioning. There is no reason to assume that television advertising is a relevant product market. Television advertising competes with advertising on radio, in newspapers and magazines and through direct mail. Table 5 below presents the distribution of advertising by medium, by selected leading NCAA advertisers. Since the data reflect 1979 advertising expenditures, one cannot compare them directly with the 1981 BAR data. Assuming that these advertisers distributed their 1981 advertising expenditures among media as they did in 1979, their NCAA advertising on average would account for about 3.5 percent of their total advertising dollars. (These data are not available on a product basis.) Table 5 merely highlights what I have emphasized above — even leading NCAA network advertisers are not specialized to NCAA telecasts.

4. College Football's Share of Sports Programming

Because the demographic characteristics (particularly the ratio of males to females) of viewers of college football telecasts and sports programs generally tend to differ from those of viewers of other programs, one might argue that sports programming is an economically distinct relevant market. Advertisers desiring to reach primarily a male audience would find sports programming particularly desirable. And if the NCAA's share of sports programming were sufficiently large, it might possess market power.

Table 5

Distribution of Advertising Expenditures Among Media For Selected Major NCAA Advertisers: 1979

Advertiser	Total Advertising Expenditures (in Thousands)	Percent of Total In:					
		Network TV	Spot TV	Print Media	Radio*	Outdoor	NCAA
Anheuser Busch	$112,768.7	55.9	14.0	8.2	20.4	1.5	2.2
AT&T	154,306.3	35.6	27.3	26.1	10.5	0.5	0.1
General Motors	323,395.9	36.3	8.8	43.2	10.3	1.4	3.7
Phillip Morris	259,201.5	33.4	6.5	48.0	1.8	10.3	9.5
RCA Corp.	74,593.2	29.4	8.5	59.6	1.9	0.6	1.8
Average		38.1	13.0	37.0	9.0	3.9	3.5

* Total of network and spot radio advertising.

Source: NCAA expenditures on which the last column is based are from the 1981 BAR Network TV Summary. All other data from *Advertising Age*, February 16, 1981, pp. S-3 — S-5.

Table 6 presents estimates of college football's share of sports programming for October and November, 1980 and 1981, in three cities, Chicago, Los Angeles, and New York. Although college football's share of sports broadcasting time varies between 10 and 14 percent during this period, its share of sports viewers is slightly lower, ranging from 7 to 12 percent. Finally, if one limits viewers to male sports viewers aged 18 to 49, college football's share varies between 7 and 12 percent.

The shares presented in Table 6 are far too low to warrant an inference that NCAA college football telecasts have market power in a market limited to sports broadcasting. Moreover, there are two reasons why the NCAA's shares in Table 6 would overstate its power.

First, I showed in subpart 4 above that advertisers are not specialized to college football or to sports in general. Thus, "sports" advertisers are able to substitute across programming types, and hence the relevant programming market is broader than sports. This means that the NCAA's share in the relevant market would be lower than its approximately 10 percent share in Table 6.

Second, assuming to the contrary that there was a sports programming market (and, as I have explained, I do not believe there is one), advertisers would be able to substitute across different time periods of the year. Since Table 6 is limited to October and November, the months with the greatest concentration of NCAA college football, a sports programming market that goes beyond these two months would result in a much lower share for college football than shown in Table 6.

Table 6

NCAA's Share of Sports Broadcasting
Nielsen Survey, October and November 1980 and 1981

Market	Year	NCAA's Share of		
		Sports Broadcast Time	Total Sports Audience	Male Sports Viewers Ages 18-49
Chicago	1980	13.23	8.79	9.89
	1981	13.63	10.07	11.31
Los Angeles	1980	9.73	8.98	9.39
	1981	10.99	11.56	11.69
New York	1980	10.83	7.02	6.71
	1981	11.00	8.47	8.94

Note: The NCAA shares were calculated as a percentage of broadcasting time and audience of all sports programming during the Nielsen Survey periods.

A final point is worth noting. It might be argued that college football offers advertisers a disproportionate number of high income viewers, and that this somehow warrants a programming market limited to college football. Data do not support this point. In 1980, NCAA football reached 16.5 percent of U.S. households with an average income over $20,000. In comparison, pro football reached 23 percent of these households, and all sports reached 14 percent of these households.[21]

In sum, even if the relevant market were limited to sports programming, which I have shown is incorrect, college football's share is too small to infer that the NCAA has market power.

[21] See Sports 1980, Nielsen Television Indices 101 and 102.

V. THE EFFECT OF THE NCAA TELEVISION CONTROLS ON ATTENDANCE AT COLLEGE FOOTBALL GAMES

In this section I summarize the results of regression analysis of the effect of the NCAA's television plan on attendance at college football games. Regression analysis is a standard empirical technique used by economists and other scientists to give quantitative estimates of the relationships among variables. It enables the researcher to measure the separate effects and degree of statistical significance of each independent variable (the causal variables) on a given dependent variable (the variable to be explained). (See Appendix C for a detailed discussion of regression analysis). A detailed description of the study is presented in Appendix D to this report.

The data sample analyzed in the regression analysis is attendance at 728 home games for 31 schools surrounding and including the University of Georgia and the University of Oklahoma during the 1977 to 1981 football seasons. The study is limited to game attendance at these schools because of its relevance to this case, and because of the additional time that would have been required to collect data for a study of all colleges.

The dependent variable in the regression analysis is attendance at home games of the schools in the sample. My hypothesis is that home attendance at these games is lower (other things the same) when one or more college football games are televised on the same day. Obviously, other factors also affect attendance at a particular game, and they must be held constant in order to measure the separate effect of televised games. These factors can be classified into three broad groups: factors that are likely to affect the quality of the particular game (e.g., homecoming, games between two teams in the same state or conference, and the record of the home team); environmental factors (e.g., rain on the day of the game, night versus day

games); and home team factors (e.g., factors specific to the home team such as enrollment, stadium capacity, and fan interest in the football team).[22]

Because a game is televised on virtually every day a college football game is played, and because most households have at least one television set, one cannot determine whether in-stadium attendance is greater when no game is televised compared to when at least one is televised. Therefore, I measured the effect of college football telecasts by asking what happens to attendance when the number of televised games increases from one to two on a given day. Since college football doubleheaders are shown only on some Saturdays during the year, I was able to compare attendance on those dates when only one game was televised to dates when two were televised, holding constant other factors relevant to attendance. Observe that this method of measuring the impact of televising college football probably understates its actual effect on attendance. If some people have already decided not to attend games because they prefer to watch the first televised college football game, the impact of a second televised game on that day is not likely to be great. Thus, if one finds a negative effect on attendance of televising a second game, the overall effect of televising college football is probably greater than that implied by the regression analysis.[23]

---

[22] Factors specific to each home team were measured by a "dummy" variable (which is explained in Appendix D) for each of the 31 schools in the sample. The regression coefficient on each dummy variable measures the school specific effect on attendance.

[23] An earlier set of studies conducted by the National Opinion Research Center (NORC) was able to evaluate directly the effects of television because: (1) there were substantial differences in the proportion of households with television sets across different areas of the country; and (2) there were Saturdays in the 1950's when no games were televised. The results of the NORC studies can be summarized as follows:

(Footnote continued on following page)

The empirical findings of my regression analysis can be summarized as follows:

1. The effect on attendance of televising two games rather than one is negative. (This effect is measured by the regression coefficient on the HEADER variable (see the regression equation presented in Table D-3 in Appendix D).) The coefficient is −.038 indicating that attendance is reduced by approximately 4 percent on average when two games rather than one are televised. The regression coefficient on HEADER is significant at about a 90 percent confidence level.[24]

(Footnote continued from preceding page)

1. At schools in areas heavily exposed to televised college football, attendance had declined by 4 percent in 1950 from the average in 1947 and 1948, while attendance at schools in areas where television ownership was not widespread had risen by 4 percent. Furthermore, after controlling for other factors that could affect attendance, such as team performance, weather, ticket prices, and population and economic changes, the adverse impact of television on attendance was still evident.

2. In the 1950 season the impact of television on attendance varied directly with the severity of television competition, with a non-regional game causing a two percent attendance differential, and an own-game telecast reducing attendance by 15 percent. NORC also found that the level of television saturation, measured by the percentage of families which owned television sets, generally negatively affected attendance.

3. In 1952, NORC reported that while television continued to have an adverse effect on college football attendance, the impact was mitigated by the NCAA's experimental plan of limiting telecasting of college games. NORC reported that "(h)ad unlimited telecasting continued to rule, and the 1950 TV differential remained the same, the loss in 1951 attendance compared to the 'expected' 1947-48 base would have been substantially in excess of two million admissions instead of the actual drop of one and one-half million." (NORC Report, quoted in 1952 Television Committee Report, p. 8).

[24] This is based on a one-tail test.

2. I also divided the sample into two sub-samples: games played by Division I teams, and games played by teams in Divisions II and III. I estimated separate regression equations for each sample (see Tables D-4 and D-5 in Appendix D). The estimated coefficients on the HEADER variable are −.023 and −.098 in the Division I and Divisions II and III regression respectively. However, only the −.098 coefficient is significant at the 90 percent level. In short, I find a 10 percent reduction in attendance on average in the Divisions II and III colleges when a second game is televised, and a much smaller (and less statistically significant) effect for Division I schools.

3. Overall, the findings on the other variables in the regression equations are consistent with my expectations. Homecoming, night games, games between teams in the same state, and a winning record are associated with increases in attendance. Rain reduces attendance at Division I schools (the only schools reporting weather). Generally, the year and school variables were significant, indicating a specific attendance effect for each year and school in the sample. Inter-conference games tend to increase attendance for Division I but reduce it for Division II and III schools. Finally, when a Division I team is televised, its attendance that day tends to be slightly greater. (This effect is not statistically significant.) One possible explanation for this positive effect is that a network tries to televise the most attractive games in order to maximize viewership. Hence, games televised would tend to have greater interest, and attract greater audiences both on television and in the stadium.

APPENDIX B **DEFENDANT'S EXHIBIT ZX-2**

Table B-1
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired By Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
1	American Express Co.	American Express	0.23%	0.82%	99.18%
2	American Express Co.	Firemans Fund Amer. Ins.	67.24	74.14	25.86
3	American Gas Assn. Inc.	American Gas Assn.	12.50	30.00	70.00
4	American Gas Assn. Inc.	Natural Gas Advertisement	5.00	20.00	80.00
5	American Hardware Supply Co.	Servi-Star Hardware St.	42.86	85.71	14.29
6	American Telephone & Teleg. Co.	American Tel. & Tel.	0.38	7.00	93.00
7	American Telephone & Teleg. Co.	Dial-It Natl. Sport News	2.09	43.46	56.54
8	American Telephone & Teleg. Co.	Yellow Pages Clssfd. Drct.	2.50	35.36	64.64
9	Anheuser-Busch Companies Inc.	Budweiser Art Collection	11.11	51.85	48.15
10	Anheuser-Busch Companies Inc.	Budweiser Beer	1.77	27.31	72.69
11	Anheuser-Busch Companies Inc.	Michelob Beer	3.04	23.70	76.30
12	Anheuser-Busch Companies Inc.	Michelob Light Beer	2.70	22.48	77.52

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
13	Anheuser-Busch Companies Inc.	Natural Light Beer	0.70	23.24	76.76
14	Bausch & Lomb Inc.	Bausch'& Lomb Products	3.45	8.62	91.38
15	Beecham Group Ltd.	Brylcreem Products	1.85	38.89	61.11
16	Bendix Corp.	Auto Lite Auto Products	10.00	56.00	44.00
17	Bendix Corp.	Fram Auto Products	8.82	55.88	44.12
18	Black & Decker Mfg. Co.	Black & Decker	2.38	26.79	73.21
19	Black & Decker Mfg. Co.	McCullock Products	7.69	69.23	30.77
20	Block Drug Co. Inc.	Tegrin Products	0.57	30.46	69.54
21	Borden Inc.	Krylon Paint	2.00	28.00	72.00
22	Bristol Myers Co.	Ban Deodorant	0.70	2.82	97.18
23	Bristol Myers Co.	Comtrex Cold Products	0.18	2.35	97.65
24	Bristol Myers Co.	Excedrin Products	0.42	3.09	96.91
25	Bristol Myers Co.	Vitalis Hair Products	1.16	45.35	54.65
26	Cannon U S A Inc.	Canon Photo Eqpt.	0.99	16.09	83.91
27	Champion Spark Plug Co.	Champion Spark Plugs	5.45	52.73	47.27
28	Connecticut General Corp.	Connecticut Gen. Life Ins.	4.30	10.75	89.25

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
29	Continental Corp.	Continental Ins.	14.46	21.69	78.31
30	DuPont De Nemours E I & Co. Inc.	DuPont Products	0.15	3.07	96.93
31	Eastern Air Lines Inc.	Eastern Airlines	5.88	29.41	70.59
32	Eastman Kodak Co.	Kodak Photo	0.61	10.62	89.38
33	Emerson Electric Co.	Poulan Products	15.00	40.00	60.00
34	Emerson Electric Co.	Skil Power Tools	7.14	71.43	28.57
35	Emery Air Freight Corp.	Emery World Wide Srvc.	1.67	20.00	80.00
36	Esmark Inc.	STP Products	11.67	28.33	71.67
37	Federal Express Corp.	Federal Express Airfreight	2.40	23.47	76.53
38	General Mills Inc.	Wheaties Cereal	1.28	28.21	71.79
39	General Motors Corp.	A C Auto Parts	18.52	77.78	22.22
40	General Motors Corp.	Chevrolet Automobiles	11.32	37.03	62.97
41	General Motors Corp.	Chevrolet Trucks	13.27	44.75	55.25
42	General Motors Corp.	Delco Auto Products	11.54	88.46	11.54
43	General Motors Corp.	General Motors Corp.	12.52	30.41	69.59
44	General Motors Corp.	GMAC Financing	5.26	21.71	78.29

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
45	General Telephone & Elec. Corp.	GTE	6.54	24.18	75.82
46	General Telephone & Elec. Corp.	GTE Phone Mart	16.67	33.33	66.67
47	General Telephone & Elec. Corp.	Sylvania Appls.	13.92	37.97	62.03
48	Gillette Co.	ATRA Products	0.70	52.11	47.89
49	Gillette Co.	Flair Pen	2.38	21.43	78.57
50	Gillette Co.	Right Guard Products	0.74	34.94	65.06
51	Goodyear Tire & Rubber Co.	Goodyear Products	20.60	49.55	50.45
52	Gulf & Western Inds. Inc.	Backwoods Smokes Cigars	9.30	81.40	18.60
53	Haggar Co.	Haggar Apparel	5.56	56.93	43.06
54	Heublein Inc.	Kentucky Fried Chicken	1.38	11.66	88.34
55	Hewlett Packard Co.	Hewlett Packard Computer	33.33	66.67	33.33
56	Hitachi Ltd.	Hitachi Appliances	0.86	18.10	81.90
57	Holiday Inns Inc.	Holiday Inns of America	7.85	32.46	67.54
58	Honda Motor Co. Ltd.	Honda Products	7.69	23.08	76.92
59	Hutton E F & Co. Inc.	E F Hutton & Co. Invstmt. Br.	16.95	35.59	64.41
60	IC Industries Inc.	Midas Muffler Shops	1.91	23.44	76.56

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
61	Ideal Toy Corp.	Ideal	4.55	14.77	85.23
62	Internatl. Business Machs. Corp.	IBM Products	1.42	14.57	85.43
63	K Mart Corp.	K Mart Disc.	1.03	24.74	75.26
64	M C A Inc.	Pursuit of D. B. Cooper	3.70	7.41	92.59
65	Mallory Randall Corp.	Tyco Toys	14.29	30.95	69.05
66	Matsushita Elec. Corp. of America	Panasonic Appliances	26.67	43.33	56.67
67	Matsushita Elec. Corp. of America	Quasar Appliances	4.00	40.00	60.00
68	Matsushita Elec. Corp. of America	Technic Stereo System	100.00	100.00	0.00
69	Mattel Inc.	Mattel Electronics	3.30	25.27	74.73
70	Meenan Oil Co.	Blueray Furnace	28.57	100.00	0.00
71	Mem Co. Inc.	English Leather Products	4.40	14.29	85.71
72	Merrill Lynch & Co.	Merrill Lynch Stockbrokers	2.79	23.69	76.31
73	Metro-Goldwyn-Mayer Film Co.	All The Marbles	3.13	34.38	65.62
74	Minolta Corp.	Minolta Camera	2.83	25.47	74.53
75	National Automotive Parts Assn.	NAPA Auto & Parts	6.76	63.51	36.49
76	Norton Simon Inc.	Avis Rent A Car	5.56	54.17	45.83
77	Owens-Corning Fiberglas Corp.	Owens Corning Products	7.03	43.75	56.25

1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
78	Paine Webber Inc.	Paine Webber Stockbroker	13.95	39.53	60.47
79	Penney J C Co. Inc.	J C Penney	0.29	6.31	93.69
80	Penwalt Corp.	Desenex Foot Remedies	5.26	36.84	63.16
81	Philip Morris Inc.	Lite Beer	2.87	64.81	35.19
82	Philip Morris Inc.	Lowenbrau Beer	2.21	60.69	39.31
83	Philip Morris Inc.	Miller High Life Beer	2.79	61.80	38.20
84	Procter & Gamble Co.	Coast Deodorant Soap	0.27	5.61	94.39
85	Procter & Gamble Co.	Head & Shoulders Shampoo	0.20	4.43	95.57
86	Purolator Inc.	Purolator Courier	3.39	20.34	79.66
87	Ramada Inns Inc.	Ramada Inn Motor Hotels	0.59	14.20	85.80
88	RCA Corp.	Hertz Rent A Car	6.25	56.25	43.75
89	RCA Corp.	RCA Victor Products	2.38	25.26	74.74
90	Reynolds R J Inds. Inc.	Royal Comfort Pipe Tobco.	2.83	31.13	68.87
91	Royal Crown Cola Co.	Arbys Drive In	1.14	13.64	86.36
92	Ryder Syst. Inc.	Ryder Truck Rental	6.90	33.62	66.38
93	S C M Corp.	Glidden Interior Paint	1.06	7.45	92.55

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
94	Savin Business Machines Corp.	Savin Products	1.72	15.52	84.48
95	Schlitz Jos Brewing Co.	Schlitz Beer	18.40	60.40	39.60
96	Sears Roebuck & Co.	Allstate Ins.	0.94	47.50	52.50
97	Sears Roebuck & Co.	Sears Dept. Stores	0.23	4.86	95.14
98	Sony Corp. of America	Sony Appliances	4.64	21.65	78.35
99	St. Regis Paper Co.	St. Regis	5.00	50.00	50.00
100	Stanley Works	Stanley Products	5.56	29.17	70.83
101	State Farm Mtl. Auto Ins. Co.	State Farm Ins.	9.38	55.36	44.64
102	Sterling Drug Inc.	Neo-Synephrine Products	0.94	6.60	93.40
103	Strauss Levi & Co.	Levi Apprl.	0.17	6.81	93.19
104	Tenneco Inc.	Walker Automotive Products	13.04	65.22	34.78
105	Texaco Inc.	Texaco Petroleum Products	29.82	77.63	22.37
106	Timex Corp.	Timex Watches	3.21	5.96	94.04
107	Trane Co.	Trane Appliances	1.85	35.19	64.81
108	Trans World Corp.	Trans World Airlines	7.32	53.66	46.34
109	US Armed Forces (JADOR)	US Armed Forces	4.92	34.43	65.57

Table B-1 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Product Classification Method)

	Advertiser	Product	Percent of Advertising Aired On: NCAA Football	All Sports	Non-Sports Programs
110	US Armed Forces (JADOR)	US National Guard	1.03	42.27	57.73
111	US Armed Forces (JADOR)	US Navy	2.75	28.44	71.56
112	UAL Inc.	United Airlines	1.10	37.02	62.98
113	Union Carbide Corp.	Eveready Products	1.03	8.05	91.95
114	Union Carbide Corp.	Prestone Automotive Products	1.82	58.18	41.82
115	United States Government	Express Mail Service	10.00	25.00	75.00
116	United States Government	US Postal Service	10.26	38.46	61.54
117	United States Tobacco Co.	Skoal Tobacco	11.32	51.89	48.11
118	Wang Laboratories Inc.	Wang Products	1.83	19.27	80.73
119	Warner Communications Inc.	ATARI	3.44	28.21	71.79
120	Warner-Lambert Pharmaceutical Co.	Rolaids Antacid	0.23	11.59	88.41
121	Xerox Corp.	Xerox Products	4.30	40.40	59.60
122	Zenith Radio Corp.	Zenith Appliances	1.10	19.78	80.22

Table B-2
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired By Advertisers
That Advertised During An NCAA Game
(Advertiser Classification Method)

	Advertiser	Percent of Advertising in: NCAA Football	All Sports	Non-Sports Programs
1	American Express Co.	4.50	5.48	94.52
2	American Gas Assn. Inc.	7.50	23.33	76.67
3	American Hardware Supply Co.	42.86	85.71	14.29
4	American Telephone & Teleg. Co.	0.74	12.76	87.24
5	Anheuser-Busch Companies Inc.	2.15	24.52	75.48
6	Bausch & Lomb Inc.	3.45	8.62	91.38
7	Beecham Group Ltd.	0.07	1.73	98.27
8	Bendix Corp.	9.32	55.93	44.07
9	Black & Decker Mfg. Co.	3.38	34.78	65.22
10	Block Drug Co. Inc.	0.13	6.69	93.31
11	Borden Inc.	0.14	3.10	96.90
12	Bristol Myers Co.	0.14	1.65	98.35
13	Canon U S A Inc.	0.63	16.28	83.72
14	Champion Spark Plug Co.	3.66	51.22	48.78
15	Connecticut General Corp.	4.30	10.75	89.25
16	Continental Corp.	14.46	21.69	78.31
17	Du Pont de Nemours E I & Co. Inc.	0.10	4.66	95.34

Table B-2 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Advertiser Classification Method)

	Advertiser	Percent of Advertising in: NCAA Football	All Sports	Non-Sports Programs
18	Eastern Air Lines Inc.	5.88	29.41	70.59
19	Eastman Kodak Co.	0.61	10.62	89.38
20	Emerson Electric Co.	6.56	39.34	60.66
21	Emery Air Freight Corp.	1.67	20.00	80.00
22	ESMARK Inc.	0.27	0.75	99.25
23	Federal Express Corp.	2.40	23.47	76.53
24	General Mills Inc.	0.02	0.40	99.60
25	General Motors Corp.	7.27	30.20	69.80
26	General Telephone & Elec. Corp.	9.43	29.10	70.90
27	Gillette Co.	0.16	11.37	88.63
28	Goodyear Tire & Rubber Co.	18.85	46.45	53.55
29	Gulf & Western Inds. Inc.	0.47	10.90	89.10
30	Haggar Co.	5.56	56.94	43.06
31	Heublein Inc.	0.89	9.18	90.82
32	Hewlett Packard Co.	33.33	66.67	33.33
33	Hitachi Ltd.	0.86	18.10	81.90
34	Holiday Inns Inc.	7.85	32.46	67.54

Table B-2 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Advertiser Classification Method)

	Advertiser	Percent of Advertising in: NCAA Football	All Sports	Non-Sports Programs
35	Honda Motor Co. Ltd.	4.27	25.36	74.64
36	Hutton E F & Co. Inc.	16.95	35.59	64.41
37	IC Industries Inc.	0.93	11.45	88.55
38	Ideal Toy Corp.	2.88	9.35	90.65
39	Internatl. Business Machines Corp.	1.42	14.57	85.43
40	K MART Corp.	1.03	24.74	75.26
41	M C A Inc.	0.23	2.31	97.69
42	Mallory Randall Corp.	14.29	30.95	69.05
43	Matsushita Elec. Corp. of America	20.69	44.83	55.17
44	Mattel Inc.	0.20	1.51	98.49
45	Meenan Oil Co.	28.57	100.00	0.00
46	Mem Co. Inc.	2.20	8.79	91.21
47	Merrill Lynch & Co.	2.75	23.37	76.63
48	Metro-Goldwyn-Mayer Film Co.	0.49	5.34	94.66
49	Minolta Corp.	2.29	20.61	79.39
50	National Automotive Parts Assn.	6.76	63.51	36.49
51	Norton Simon Inc.	0.23	2.26	97.74

Table B-2 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Advertiser Classification Method)

	Advertiser	Percent of Advertising in: NCAA Football	All Sports	Non-Sports Programs
52	Owens-Corning Fiberglas Corp.	7.03	43.75	56.25
53	Paine Webber Inc.	13.95	39.53	60.47
54	Penney J C Co. Inc.	0.29	6.31	93.69
55	Pennwalt Corp.	0.85	5.98	94.02
56	Philip Morris Inc.	1.81	42.46	57.54
57	Procter & Gamble Co.	0.01	0.76	99.24
58	Purolator Inc.	3.30	20.34	79.66
59	Ramada Inns Inc.	0.59	14.20	85.80
60	RCA Corp.	2.84	28.61	71.39
61	Reynolds R J Inds. Inc.	1.94	21.29	78.71
62	Royal Crown Cola Co.	1.14	13.64	86.36
63	Ryder System Inc.	6.90	33.62	66.38
64	S C M Corp.	0.42	3.78	96.22
65	Savin Business Machines Corp.	1.72	15.52	84.48
66	Schlitz Jos Brewing Co.	10.85	41.04	58.96
67	Sears Roebuck & Co.	0.30	9.00	91.00
68	Sony Corp. of America	4.64	21.65	78.35

Table B-2 (cont.)
1981 Broadcast Advertisers Reports Network TV Summary
Distribution of Spots Aired by Advertisers
That Advertised During An NCAA Game
(Advertiser Classification Method)

	Advertiser	Percent of Advertising in: NCAA Football	All Sports	Non-Sports Programs
69	St Regis Pager Co.	5.00	50.00	50.00
70	Stanley Works	5.56	29.17	70.83
71	State Farm Mtl. Auto Ins. Co.	9.38	55.36	44.64
72	Sterling Drug Inc.	0.04	0.51	99.49
73	Strauss Levi & Co.	0.17	6.81	93.19
74	Tenneco Inc.	2.29	24.43	75.57
75	Texaco Inc.	29.82	77.63	22.37
76	Timex Corp.	3.21	5.96	94.04
77	Trane Co.	1.85	35.19	64.81
78	Trans World Corp.	0.63	7.55	92.45
79	US Armed Forces (JADOR)	1.80	35.41	64.59
80	UAL Inc.	1.10	37.02	62.98
81	Union Carbide Corp.	0.68	9.53	90.47
82	United States Government	10.17	33.90	66.10
83	United States Tobacco Co.	11.01	50.46	49.54
84	Wang Laboratories Inc.	1.83	19.27	80.73
85	Warner Communications Inc.	1.43	13.64	86.36
86	Warner-Lambert Pharmaceutical Co.	0.02	1.95	98.05
87	Xerox Corp.	4.30	40.40	59.60
88	Zenith Radio Corp.	1.10	19.78	80.22

APPENDIX C

INTRODUCTION TO REGRESSION ANALYSIS

Regression analysis is a standard empirical tool used by economists, other social scientists, and other scientists. It is gaining increasing acceptance in litigation: in antitrust cases (*see*, e.g., *United States* v. *United Technologies Corp.*, 1977-2 Trade Cas. (CCH) ¶ 61,647 (N.D. Ohio 1977) (use of Joskow-Baughman econometric model to establish cross-elasticities of demand)), regulatory proceedings (*see*, e.g., the regression analysis submitted to the Civil Aeronautics Board in the North Central Airlines-Southern Airways merger case and reprinted in Carlton, Landes & Posner, *Benefits and Costs of Airline Mergers: A Case Study*, 11 Bell J. Econ. 65 (1980)), and employment discrimination cases (*see*, e.g., *Presseisen* v. *Swarthmore College* 442 F. Supp. 593 (E.D. Pa. 1977)).

Regression analysis is used to give a quantitative estimate of the relationships among variables.[1] The first step is the construction of a model. A model is simply a system of equations that embodies some theory about the relationship among the variables. Each equation in the system will have a dependent variable (a variable to be explained) and one or more independent (causal) variables, each of which is expected to have some effect on the dependent variable. The regression coefficient on each independent variable measures the effect of a change in that variable on the dependent variable—that is, the effect on the dependent variable of a change in the independent variable alone, holding all other variables constant.[2]

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[1] Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L. Rev. 702 (1980), provides a more complete explanation of the construction and use of regressions. See also, M. Finkelstein, *Quantitative Methods in Law* 4-11, 14-17, 211-226 (1978).

[2] Regression coefficients and related statistics (e.g., correlation coefficients, standard errors, etc.) are estimated using standard computer programs.

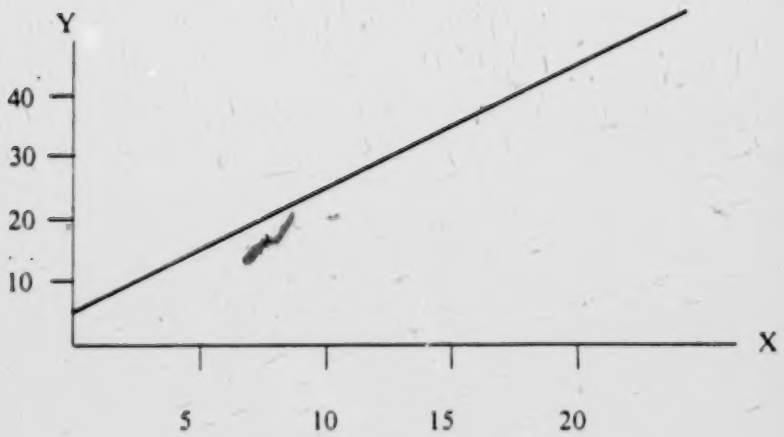
To illustrate, suppose we have data on variables X, Y, and Z, and we want to know how changes in X and Z affect Y. A simple model of this relationship would be:

$$Y = B_0 + B_1X + B_2Z + u.$$

B_1 and B_2 are the regression coefficients; they tell us what influence X and Z have on Y. B_0 is a constant.[3] The last term, u, is called the residual or error term. It reflects both random fluctuations in the data and the effect of left-out variables that

[3] Suppose that every time X increases by 1, Y increases by 2, and that Y starts at 5 while X is still zero. To simplify further assume Z has no effect on X.

Then $B_0 = 5$, $B_1 = 2$, and $B_2 = 0$, so that $Y = 5 + 2X$. A graph of this relationship would look like this:



Thus the constant term indicates where the regression line intersects the vertical axis. In many regression analyses, however, the intercept point is not of interest to the analyst.

are not associated with X or Z. If the computer finds that $B_0 = 5$, $B_1 = 2$ and $B_2 = -1$, this means that if X increases by 1 unit, Y will increase by 2 units; if Z increases by 1 unit, Y will fall by 1 unit; if X and Z increase by 1 unit each, Y will increase by 1 unit; and if X and Z are zero, Y will be 5. Thus, the regression coefficients B_1 and B_2 measure the effect of changes in one independent variable while the other remains unchanged.

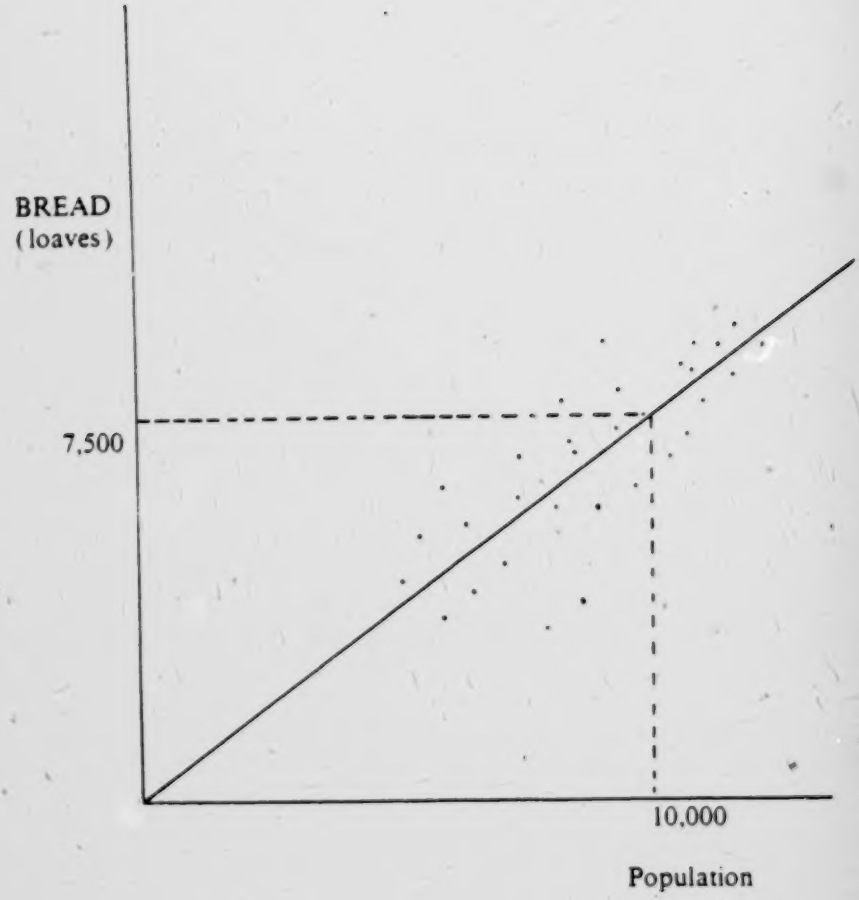
Although we have used an example with two independent variables, the analysis can be generalized to many independent variables. Moreover, although our example assumes a linear relationship between the independent variables and the dependent variable, that assumption could be altered. For example, one might specify a model in which the natural logarithms of variables are used. When this is done, the regression coefficients measure the percentage (rather than unit) change in Y resulting from a one percent (rather than one unit) change in X or Z.

Figure 1 graphs a regression equation. Assume that we know (i) total bread sales in each of 30 cities and (ii) the population of each city (in thousands), and that other factors (e.g., income and the price of bread) influencing bread sales have the same values in each city. We specify the following regression model to test whether bread sales are related to population:

$$BREAD = B_0 + B_1 POP + u.$$

Assume the computer estimates that $B_0 = 0$ and $B_1 = 0.75$. This would mean that bread sales increase by 75 loaves when population increases by 100 persons. Since we are working with a two-variable model, this result can be interpreted graphically as a line with an intercept of 0 (implying, logically enough, that no bread is sold when population is zero) and a slope of 0.75. The individual dots in Figure 1 represent individual observations. (E.g., if some city had a population of

Figure 1



7,000 and 6,000 loaves of bread were sold there, this population-bread pair, a point at the intersection of 7,000 on the horizontal axis and 6,000 on the vertical axis, would be one observation.) Notice that in Figure 1 most of the observations do not fall on the regression line; there is some unexplained variation in bread sales. The error term, u, measures the vertical distance between each observed population-bread pair and the predicted one. To fit the regression line to the scatter of observations, the computer executing the regression program is told to choose (in a linear regression) the straight line that minimizes the sum of the squared error terms. This procedure results in a straight line that fits the data best. Squaring the errors gives equal weight to positive and negative distances from the regression line and scales the data so that standard measures of statistical significance can be used.

It is important to know how well the regression model "fits" (explains) the data. Two measures commonly are used for this purpose. The first is the t-statistic associated with each regression coefficient. The t-statistic allows us to test whether the corresponding regression coefficient is statistically significant. Although there is no precise t-value for determining when a regression coefficient is statistically significant, it is conventional in economic empirical work to specify that a positive regression coefficient is statistically significant if there is less than one chance in 10 or in 20 that the coefficient really is zero or negative. This requires a t-statistic of 1.65 or 1.96 if the sample contains at least 100 observations. As the value of the t-statistic approaches zero, the probability grows that the variable in question really has no effect on the dependent variable (i.e., that one cannot reject the hypothesis that the true coefficient is zero).[4]

[4] Each t-value implies a specific probability that the coefficient for the independent variable under examination is different from zero. For a sample containing at least one hundred observations t-values of about 1.65 or 1.96 (in absolute value) means there is 90 percent or 95 percent probability that the coefficient is different from zero (and thus

(Footnote continued on following page)

The second statistic is R^2, which measures the percentage of variation in the dependent variable that is accounted for by all the independent variables. R^2 measures the goodness of fit of the entire regression model rather than the significance of particular independnet variables. Its value can range from zero to one. If R^2 is zero, the regression model explains none of the variance in the dependent variable. If it is one, the independent variables explain all of the variance in the dependent variable.[5] R^2 is difficult to interpret because it depends on the size, degree of aggregation, and other characteristics of the data. Most empirical studies therefore rely more on t-statistics.[6]

Although this may have seemed somewhat technical, the points required to understand our analysis can be stated simply.

1. Multiple regression analysis is a way of analyzing the effects of a number of independent variables on a dependent variable.
2. The regression coefficients indicate the effect of each independent variable on the dependent variable, holding constant the effects of all other independent variables. It thus enables one to separate important variables from unimportant ones and to estimate what would happen if any one variable was changed.

(Footnote continued from preceding page)

has some effect on the dependent variable). These t-values are for a two-tail test of the significance of an independent variable. A two-tail test is used when there is no strong hypothesis on the predicted sign of the independent variable, and the researcher seeks to determine if the observed regression coefficient is significantly different from zero. When there is a strong prediction on the variable's sign, a one-tail test may be more appropriate. The required t-statistics corresponding to 90 and 95 percent levels of significance are 1.28 and 1.65.

[5] Alternatively, one can say that $(1-R^2)$ is the unexplained or residual variation in the dependent variable. The random error term u in the above equation $Y = B_0 + B_1X + B_2Z + u$ measures the residual variation in Y.

[6] The problems of R^2 statistics are noted in J. Kmenta, *Elements of Econometrics* 233-35 (1971), and in H. Theil, *Principles of Econometrics* 181 (1971).

3. The regression coefficients show the magnitude and direction of the effect of any independent variable on the dependent variable, and the corresponding t-statistic shows whether the effect is statistically significant.

4. The goodness of fit of the regression model is measured by R^2, the coefficient of determination.

APPENDIX D

AN EMPIRICAL ANALYSIS OF THE EFFECT OF THE NCAA TELEVISION PLAN ON ATTENDANCE AT FOOTBALL GAMES

Appendix D presents in detail the regression study of attendance summarized in Part V of this report. Table D-1 lists each school that is included in our study, along with its NCAA division; and Table D-2 lists the definitions of all variables included in the regressions. Appendix E discusses the sources for the variables.

The results of the regression analysis are shown beginning with Table D-3. Each coefficient can be interpreted (approximately) as the percentage change in attendance that would result from a one percent change in that variable.[1] If the variable is a dummy variable then the coefficient should be interpreted as the percentage change in attendance that occurs when that condition is true, rather than not true.[2] For example, the coefficient on HEADER measures the percentage change in attendance when a double header is shown relative to days when only a single game is shown. The column labelled "t-Statistics" presents a statistic that summarizes the significance of the estimated coefficient (the meaning of this statistic is explained in Appendix C).

In Table D-3 results are presented from a regression estimated over the whole sample of teams. In this regression the effects of the independent variables are not allowed to differ

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[1] Because the dependent variable is the logarithm, rather than the actual value of attendance, the change in attendance resulting from a change in a dummy variable is actually measured as the exponent of the coefficient minus one. This technical point is of little concern unless the coefficient is large in absolute value.

[2] A variable that represents the presence or absence of some condition (e.g., a game between conference members) by a value of one or zero is called a "dummy" variable.

Table D-1

Colleges and Universities in Our Sample

Georgia	Oklahoma
University of Georgia (I-A)	University of Oklahoma (I-A)
Auburn (I-A)	University of Arkansas (I-A)
Clemson (I-A)	Bishop (III)
Davidson (I-AA)	East Texas State (II)
Fort Valley State (II)	North Texas State (I-A)
Furman (I-A)	Oklahoma State (I-A)
Georgia Tech (I-A)	Southern Methodist University (I-A)
Jacksonville State (II)	Southwestern Missouri (II)
Johnson C. Smith (II)	University of Texas at Arlington (I-A)
Morehouse (II)	Texas Christian University (I-A)
Morris Brown (II)	Texas Tech (I-A)
Savannah State (III)	University of Tulsa (I-A)
University of the South (III)	West Texas State (I-A)
University of South Carolina (I-A)	
University of Tennessee at Chattanooga (I-A)	
Tuskeegee Institute (II)	
Western Carolina (I-A)	
West Georgia (III)	

Table D-2

Definition of Variables Used in Analysis of Game Attendance

Variable	Description
LATTEND	Natural logarithm of the total attendance at a game in our sample.
HEADER	A variable taking the value 1 for days on which there is a televised college football double-header, 0 otherwise.
ENDWINS	The home team's end-of-season wins as a percent of total games played. (Ties are counted as 0.5).
CONFERENCE	A variable taking the value 1 if the home team and opponent are members of the same conference, 0 otherwise.
STATE GAME	A variable taking the value 1 if the home team and opponent are located in the same state, 0 otherwise.
RAIN	A variable taking the value 1 if the game report filed with the NCAA indicated any precipitation during the game, 0 otherwise.
HOT	A variable taking the value 1 if the game report filed with the NCAA indicated the temperature during playing time was 85 degrees or greater, 0 otherwise.
COLD	A variable taking the value 1 if the game report filed with the NCAA indicated the temperature during playing time was 40 degrees or less, 0 otherwise.
HOMECOMING	A variable taking the value 1 if the game played is the Homecoming game, 0 otherwise.
NIGHT GAME	A variable taking the value 1 if the game was played at night (after 6:00 p.m.), 0 otherwise.

Table D-2
(continued)

Definition of Variables Used in Analysis of Game Attendance

Variable	Description
TELEVISE	A variable taking the value 1 if the game was televised, 0 otherwise.
1978	A variable taking the value 1 if the game was played in that year, 0 otherwise.
1979-1981	Defined in the same manner as the 1978 variable.
SCHOOL VARIABLES	For each school in our sample, a variable was defined to take the value 1 if that school was the home team, 0 otherwise. The variable names correspond to the school names.

Table D-3

Regression of Logarithm of Game Attendance on Factors Influencing Attendance, Excluding Weather (Pooled Sample)

Dependent Variable: Log Total Attendance
Number of Observations: 728
R^2 : 0.90

Variable	Coefficient	t-Statistics
Intercept	8.941	90.92
HEADER	-0.040	-1.29
ENDWINS	0.110	1.28
CONFERENCE	-0.052	-1.63
STATE GAME	0.149	4.40
HOMECOMING	0.234	6.06
NIGHT GAME	0.139	3.77
TELEVISE	0.046	0.78
1978	0.043	0.97
1979	0.067	1.49
1980	0.065	1.48
1981	0.094	2.14
SCHOOL VARIABLES:		
Arkansas	1.654	15.99
Auburn	1.868	18.15
Bishop	-0.907	-8.19
Clemson	1.838	17.01
Davidson	-1.204	-10.21
East Texas State	-0.927	-5.57
Fort Valley State	-0.373	-3.35
Furman	0.151	1.42
Georgia	1.978	18.77
Georgia Tech	1.422	13.63
Jacksonville State	0.006	0.06
Johnson C. Smith	-0.854	-7.65
Morehouse	-0.121	-1.10
Morris Brown	0.022	0.20
North Texas State	0.358	3.16
Oklahoma	2.133	19.75
Oklahoma State	1.627	15.33
Savannah State	-0.422	-3.79
South Carolina	1.717	17.15

Table D-3
(continued)

Regression of Logarithm of Game Attendance on Factors Influencing Attendance, Excluding Weather
(Pooled Sample)

Variable	Coefficient	t-Statistics
Southern Methodist U.	1.247	11.85
U. of the South	-1.795	-13.98
Southwestern Missouri	-0.509	-4.80
Texas Christian U.	0.700	6.51
U. of Tennessee at Chattanooga	-0.096	-0.90
Tulsa	0.687	6.51
Tuskegee Institute	-0.044	-0.33
U. of Texas at Arlington	-0.421	-3.98
Texas Tech	1.469	14.33
Western Carolina	-0.098	-0.94
Western Georgia	-0.375	-2.06
West Texas State*	—	—

* No coefficient is estimated for West Texas State in this regression. It is necessary to exclude one school variable when an intercept is estimated, as we do in this regression, to avoid multicollinearity. Multicollinearity occurs when one variable is identical to another for all observations in the sample, or when the sum of several variables is identical to another. The intercept is merely the value 1 for each observation (that is, each game for our sample). Since each school variable takes the value one for observations when that school is the home team, and zero otherwise, the sum of all the school variables equals the value of the intercept. The computer is unable to estimate accurately the coefficients for the collinear variables.

Because West Texas State is not represented by a school variables, the intercept term actually represents the mean value of the log of attendance for that school (holding constant the effects of the other variables in the regression). Each school variable then shows the amount by which average log attendance for that school (again, holding constant the effect of these variables) differs from that of West Texas State.

according to whether the school is in Division I, Division II or Division III. In addition, because no weather data are available for schools in Divisions II and III, the weather variables could not be included in the regression. The results generally agree with my expectations of the determinants of attendance at college football games. For example, attendance at an in-state game is about 14 percent higher than at games between teams from different states; attendance on homecoming weekend is about 20 percent higher than on other weekends; and night games attract about 14 percent more people than day games. Other variables are less significant[3], but still suggest an effect in the expected direction, such as the 11 percent attendance increase that results if a team's winning percentage rises from zero to one and the slow increase in per-game attendance that occurred between 1977 and 1981.

The effect on attendance of telecasting two games rather than one is measured by the coefficient on HEADER. The results show a 4 percent attendance reduction on days then two games rather than one are televised. This coefficient is significant at a 90 percent confidence level.[4]

Because of the considerable variation among teams in the quality and character of their football programs, the sample was divided into games played by Division I teams and games played by teams in Divisions II and III and separate regressions were estimated for these two samples. Weather variables were included in the regressions for Divisions I. The results, shown in Tables D-4 and D-5, show that an increase in the school's winning percentage, measured by ENDWINS, increases attendance at Division II and III schools but has no effect on

[3] In our discussion of the results, the terms "significant" or "significantly" refer to statistical significance in the sense discussed in Appendix C. Unless explicitly mentioned a variable is considered significant if its t-statistic is 1.65 (in absolute value) or greater.

[4] This means that there is less than one chance in ten that the coefficient is actually zero.

Division I schools. A game between two schools in the same state increases attendance significantly at all schools, but has a larger effect on Division I. Homecoming weekend increases attendance significantly at all schools, but by a much larger amount in Divisions II and III. Attendance at night games is larger than at day games by approximately the same amount at schools in both sets of divisions. Rain reduces attendance at Division I schools, but extreme temperatures appear to have no effect on an attendance.

The effect of having two rather than one game telecast in an afternoon is measured by the coefficient on HEADER. For Division I teams the coefficient is -0.022, sugesting about a two percent reduction in attendance from telecasting a double header rather than a single game (although the coefficient is not significant). For Division II and III teams, however, the effect is considerable larger, with attendance declining by approximately 10 percent. This suggests that by restricting the number of college football telecasts permitted, the NCAA may have expanded attendance at live games.

For Division I teams, which are the only teams in our sample ever televised, no significant effect on attendance was found if the game itself was televised. This variable is probably measuring two opposing tendencies, the fact that some people stay home rather than attend a game if that game can be seen on television and the fact that games that are televised tend to be high quality and attract large audiences, and the net effect appears to be zero.

Table D-4

Regression of Logarithm of Games Attendance on Factors Influencing Attendance, Including Weather Divisions I-A and I-AA Only

Dependent Variable: Log Total Attendance
Number of Observations: 482
R^2: 0.91

Variable	Coefficient	t-Statistic
Intercept	8.940	102.45
HEADER	-0.022	-0.69
ENDWINS	0.053	0.65
CONFERENCE	0.024	0.77
STATE GAME	0.184	4.99
HOMECOMING	0.097	2.53
NIGHT GAME	0.134	3.50
TELEVISE	0.049	0.98
RAIN	-0.178	-3.47
HOT	0.042	1.25
COLD	-0.083	-0.92
1978	0.052	1.20
1979	0.071	1.63
1980	0.136	3.21
1981	0.098	2.31

Note: Dummy variables for each school were also included in this and subsequent regressions but their coefficients are not report.

Table D-5

Regression of Logarithm of Games Attendance on Factors Influencing Attendance, Excluding Weather Divisions II and III Only

Dependent Variable: Log Total Attendance
Number of Observations: 211
R^2: 0.59

Variable	Coefficient	t-Statistic
Intercept	8.308	25.39
HEADER	-0.098	-1.33
ENDWINS	0.432	1.65
CONFERENCE	-0.231	-2.60
STATE GAME	0.138	1.85
HOMECOMING	0.556	5.95
NIGHT GAME	0.164	2.02
1978	0.005	0.04
1979	-0.010	-0.80
1980	-0.101	-0.85
1981	0.030	0.26

Note: See Table D-4.

APPENDIX E

Sources of Data Used in Attendance Study

The data used in the study of attendance cover the period 1977 to 1981 and were collected for the 31 schools shown in Table D-1. Attendance data were taken from unpublished reports filed with the NCAA by each school. Both the home and visiting teams in Division I-A and I-AA file weekly reports after each football game. These reports, called *Summary of Football Game Statistics*, provide information on game attendance, score, kickoff time, temperature, precipitation and various statistics on the performance of individual players. Most of these reports provided all the information requested, although some were missing certain data. Weather information was missing most often, and kickoff time was sometimes not reported. From these reports we took information on game score, kickoff time, temperature and precipitation.

Each Division I-A and I-AA team is also required to report to the NCAA at the end of each football season the paid and total attendance at each home game. These *NCAA Football Attendance Reports* were the source of data on game attendance (total attendance). The attendance figures reported on these end-of-year reports are considered more accurate than the figure given on the weekly game reports, because an accurate attendance count cannot always be made until a considerable time after the game, and the weekly reports must be filed immediately. If a school failed to file an annual attendance report, however, attendance figures were taken from the weekly sheets.

For Divisions II and III, attendance figures for all games are given in an annual *Final Cumulative Football Statistics Report* filed with the NCAA at the end of the season. These reports list the opponent, score, and attendance, but give no information on date of game, kickoff time or weather. In cases where a school did not report attendance for a particular home

game but its opponent was also a school in the sample and reported attendance, the visiting team's attendance figure was used.

Additional descriptive information about the schools and specific games were taken from the annual *NCAA Football Records*. These books contain the schedule of each team, including opponent, date and whether the game was scheduled at night, as well as the location and division and, for Division I-A and I-AA teams, conference. In addition the *Records* report the previous year's record of each team. These books were used to determine whether Division II and III games for which information was missing); to determine the date on which all Division II and III games were played; and for information on division, location, and (for Divisions I-A and I-AA) conference, both for the teams in the sample and (for division, location and conference) for their opponents.

Data on conference affiliation of Division II and III teams were taken from the *NCAA Directory, 1981-82*.

Information on the date of homecoming weekend was collected by telephone from sports information directors at the schools in our sample.

Information on the number of televised games played on a particular date was taken from the annual NCAA *Television Plans*, which contain the television schedule for the year.

PLAINTIFFS' EXHIBIT 1A

1982-83

Manual of the National Collegiate Athletic Association

Constitution, Bylaws, Interpretations
Executive Regulations, Recommended Policies
Enforcement Procedure, Administration
Constitution and Bylaws Case Book

• • •

Constitution and Interpretations of
The National Collegiate Athletic Association

* * *

ARTICLE ONE

NAME

The name of this organization shall be "The National Collegiate Athletic Association."

ARTICLE TWO

PURPOSES AND FUNDAMENTAL POLICY

Section 1. Purposes. The purposes of this Association are:

(a) To initiate, stimulate and improve intercollegiate athletic programs for student-athletes and to promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit and athletic excellence;

(b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;

(c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;

(d) To formulate, copyright and publish rules of play governing intercollegiate sports;

(e) To preserve intercollegiate athletic records;

(f) To supervise the conduct of, and to establish eligibility standards for, regional and national athletic events under the auspices of this Association;

(g) To cooperate with other amateur athletic organizations in promoting and conducting national and international athletic events;

(h) To legislate, through bylaws or by resolution of a Convention, upon any subject of general concern to the members in the administration of intercollegiate athletics; and

(i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletic activities on a high level.

Section 2. Fundamental Policy. (a) The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports.

(b) Legislation governing the conduct of intercollegiate athletic programs of member institutions shall apply to basic athletic issues such as admissions, financial aid, eligibility and recruiting; member institutions shall be obligated to apply and enforce this legislation, and the enforcement program of the Association shall be applied to an institution when it fails to fulfill this obligation.

ARTICLE THREE

PRINCIPLES FOR THE CONDUCT OF INTERCOLLEGIATE ATHLETICS

Section 1. Principle of Amateurism and Student Participation. An amateur student-athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom and to whom participation in that sport is an avocation. *(Revised: 1/9/74)*

* * *

Section 5. Principle Governing Recruiting. The recruiting of student-athletes shall be controlled by bylaws enacted by the Association.

* * *

Section 8. Principles Governing Playing and Practice Seasons. (a) Member institutions shall not schedule intercollegiate athletic contests in conjunction with professional sports contests or exhibitions.

(b) Organized practice and playing seasons in all sports may be controlled by bylaws enacted by the Association.

* * *

Section 10. Principle Governing Personnel and Squad Limitations. The bylaws of the Association may prescribe limitations as to the number of coaches a member institution may employ or otherwise utilize, the size of a squad in any sport and game scouting activities. *(Adopted: 8/15/75)*

Section 11. Principle Governing Football Television. The telecasting, cablecasting or otherwise televising of intercollegiate football games of member institutions shall be controlled by bylaws enacted by the Association. *(Adopted: 1/12/82)*

ARTICLE FOUR

MEMBERSHIP

* * *

Section 2. Conditions and Obligations of Membership. The members of this Association agree:

(a) To administer their athletic programs in accordance with the constitution, the bylaws and other legislation of the Association;

* * *

Section 6. Termination of Membership—Discipline of Members. (a) Disciplinary powers of the Association shall be exercised in accordance with the provisions of this section and the bylaws.

(b) The membership of any active or allied member failing to maintain the academic or athletic standards required for membership or failing to meet the conditions and obligations of membership may be terminated or suspended or the member otherwise disciplined by a vote of two-thirds of the delegates present and voting at an annual Convention, provided that a member shall not be suspended or its membership terminated unless:

(1) Notice of intention to move such termination or suspension, stating the grounds on which such motion will be based, is given in writing to the secretary of this Association and to the chief executive officer of such member on or before the first day of November prior to the Convention; and

(2) The Council approves the giving of the notice of intention to move for such termination or suspension, and

(3) Such notice is included in the Official Notice of the annual Convention.

(c) The membership of any associate or affiliated member failing to meet the conditions and obligations of membership or failing to support and adhere to the purposes and policies set forth in Article 2 of this constitution may be terminated or suspended or the member otherwise may be disciplined through the following procedure: *(Adopted: 1/10/79)*

(1) The Committee on Infractions, by majority vote, may recommend such action to the Council, which may adopt the recommendation by a two-thirds vote of its members present and voting. *(Adopted: 1/10/79)*

(2) The associate or affiliated member shall be advised of the proposed action at least 30 days prior to any Committee on Infractions or Council meeting in which such action is considered and shall be provided the opportunity to appear at any such meeting. *(Adopted: 1/10/79)*

(d) Disciplinary or corrective actions other than suspension or termination of membership may be effected during the period between annual Conventions by members of the Committee on Infractions present and voting at any duly called meeting thereof, provided the call of such meeting shall have contained notice of the situation presenting the disciplinary problem. The actions of the Committee on Infractions, however, shall be subject to review by the Council upon appeal. *(Revised: 1/13/73)*

(e) If an active member's accreditation is removed by its regional accrediting agency, said active member shall be reclassified immediately as an associate member.

(f) If any member of an athletic conference is found to be ineligible for active membership in this Association, such conference shall be ineligible for allied membership and its membership terminated, unless the conference has 40 or more members and at least 90 percent of said conference members are active members of this Association.

(g) The membership of any active, allied, associate or affiliated member failing to pay its annual dues for one year shall be terminated automatically.

(h) Upon any termination or suspension of membership, all rights and privileges of the member shall cease forthwith.

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ARTICLE FIVE

ORGANIZATION

Section 1. Council. The establishment and direction of the general policy of the Association in the interim between Conventions is committed to a Council of 22 members, including at least four women, which shall be elected at the annual Convention of the Association. *(Revised: 1/14/81)*

* * *

ARTICLE SIX

BYLAWS, INTERPRETATIONS, EXECUTIVE REGULATIONS AND RESOLUTIONS

* * *

Section 2. Interpretations. The Council, in the interim between Conventions, and the president, secretary-treasurer and executive director, in the interim between meetings of the Council, are empowered to make interpretations of the constitution and bylaws which shall be binding after their publication and circulation to the membership, or after notification to a member institution when the interpretation is limited to that institution and not of general significance or application to the membership at large. Any member of the Association may request that any such interpretation be passed upon by the next annual Convention by making request in writing to the secretary prior to 1 p.m. on the day preceding the business session of the Convention. *(Revised: 1/12/77)*

(a) If an interpretation of the constitution submitted to the Convention fails to receive a two-thirds majority of those delegates present and voting, thereafter it shall not be binding upon the membership.

(b) If an interpretation of the bylaws submitted to the Convention fails to receive a majority of those delegates present and voting, thereafter it shall not be binding upon the membership.

• • •

ARTICLE EIGHT

FOOTBALL TELEVISION

(Adopted: 1/12/82)

Section 1. Control of Football Television. The Association shall control all forms of the telecasting, cablecasting or otherwise televising of the intercollegiate football games of member institutions during the traditional fall season as defined in Bylaw 3-2 in accordance with the following provisions.

Section 2. Football Television Principles. The terms of the Association's control shall be set forth in television principles for each division (i.e., Divisions I, II and III) as periodically prepared by the Football Television Committee and approved by majority vote of those voting in the respective divisions. [Note: The provisions of Bylaw 11-1-(g) do not apply to voting by Division I under this bylaw article.]

(a) Only members that sponsor varsity intercollegiate football shall be permitted to vote on adoption of NCAA football television principles and on amendments to this bylaw article, provided, however, that all such principles shall be subject to the rescission provisions set forth in Bylaw 13. An institution which sponsors football as a varsity intercollegiate sport in a division other than its membership division shall vote in the division in which its football program is classified.

(b) Each division shall determine its own procedure for the approval of the football television principles and the formulation and adoption of the provisions of a supporting

plan. The members of a division may approve such principles by mail referendum of those members.

(c) Any commitment by a member institution with respect to telecasting or cablecasting or otherwise televising its football games in a future season or seasons shall be subject to the terms of the NCAA football television principles and supporting plan provisions applicable to such season(s) for that institution's football division.

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PLAINTIFFS' EXHIBIT 130

1981 NCAA Football Television Committee Report

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

1. The NCAA Television Plan and its Operation in 1981

The NCAA's program of controlled football television is designed to bring attractive, representative college games to the nation's television viewers weekly while protecting to the highest extent possible the in-stadium attendance of each football-playing member of the Association.

The principles of the 1978-1981 Plan, under which the 1981 NCAA Football Series was televised by ABC-TV, were authorized by the membership in May 1977, by a 304-65 referendum; and the Plan subsequently was negotiated in detail with the network by the Television Committee. During college football's 113th season of play, the NCAA's 32nd Television Committee administered all of the Association's football television activity under terms of that Plan.

* * *

Promotion

The NCAA Football Television and Promotion committees worked together again to provide maximum exposure for college football.

For the 12th consecutive year, the press kit supplied by the NCAA Statistics Service proved to be a valuable and worthwhile source of information to media representatives around the country. Weekly statistical rankings for the four divisions of NCAA football were issued, as well as the annual NCAA Football Records book.

Film features on NCAA events and personal features were produced under the direction of Ron Schwartz, director of the NCAA Television News Service in New York City. Between four and six film clips of individual features were sent via the networks' daily electronic feed services to their affiliates each week. Features also were provided to ESPN, the Cable News

Network and two associations that provide news features to independent television stations. In addition, advance information on the college football and basketball seasons was sent out from the New York office.

The NCAA Promotion Committee and ABC-TV teamed up once again this year to cosponsor the College Football Press Tour prior to the start of the season. Six top student-athletes traveled to seven cities on a trip designed to present college football representatives to media in different parts of the nation. This year, the players making the tour were Tony Hunter, Notre Dame; Jim McMahon, Brigham Young; Darrin Nelson, Stanford; Art Schlichter, Ohio State; Tommy Wilcox, Alabama, and Charlie Wysocki, Maryland. Stops were made in Kings Island, Ohio; New York; Boston; Dallas; San Francisco, and Los Angeles. When the group was in Kings Island, its activities were coordinated with the annual meeting of the Football Writers Association of America. A press conference with the student-athletes and a nationally prominent coach(es) was scheduled in each city. The majority of the time was devoted to individual interviews. The players were joined on the coast-to-coast tour by Keith Jackson.

The "College Football Preview," which was inaugurated in 1977 by the promotion committee, has proven to be extremely popular with writers, who receive information about the upcoming football season. The February 1981 preview included some 70 writers from across the country and nine of the most successful college coaches for the Kansas City meeting.

In 1979, in response to requests from chief executive officers of member institutions and with the assistance of the Council for the Advancement and Support of Education and other education groups, the committee adopted a new format for utilization of the promotional time allocated the Association on series telecasts.

It developed a series of 90-second messages on higher education designed to transmit the three traditional functions of the collegiate institution—teaching, research and service to the community. The program was continued in 1981 with a new theme. Six such messages were produced by NCAA Productions, with most aired twice on the 12 national telecasts. They were preceded by an introductory message on the initial series telecast. The theme of each was "America's Energy is Mindpower."

On the 10 regional presentations, the NCAA used promotional messages covering a wide range of topics of interest to its membership and related to intercollegiate athletics, including NCAA championships, drug education, sports medicine and proper recruiting.

In addition, four 15-second promotional messages on college athletics were presented during each telecast. At half time, a presentation from each competing institution was aired. The committee also authorized 30-second messages promoting the National Football Foundation's College Hall of Fame in Kings Island, Ohio, during half time of the national telecasts.

Division I-AA, Division II and Division III Championships

The Association's reorganization in 1973 converted the College Division into Division II and Division III; and the ninth national football championships in those two divisions were televised in 1981, plus the fourth Division I-AA championship, which was established in 1978.

ABC Sports provided regional coverage December 5 of the National Collegiate Division III Football Championship, won by Widener, 17-10, over defending champion Dayton in the Stagg Bowl in Phenix City, Alabama. The Division II semifinal contests on that date (Southwest Texas State 62, Northern Michigan 0; North Dakota State 18, Shippensburg State 6) also

were televised regionally. ABC's coverage December 12 included a regional telecast of the National Collegiate Division II Football Championship, won by Southwest Texas State, 42-13, over North Dakota State in the Palm Bowl in McAllen, Texas. In addition, Division I-AA was represented on December 12 with regional telecasts of its semifinal games (Eastern Kentucky 23, Boise State 17; Idaho State 41, South Carolina State 12). The Division I-AA championship game—won by Idaho State, 34-23, over Eastern Kentucky—was nationally telecast December 19 from Wichita Falls, Texas.

* * *

2. Team Participation

Widespread participation by NCAA members on different types of television programming, including the NCAA series itself, marked the 1981 college football season.

In addition to the 76 institutions appearing on the series, another 46 appeared in exception telecasts and other types of programs for a total of 122 in 1981. In 1980, 136 appeared.

Revenue from the series was shared by 145 institutions in 1981.

During the past season, the following numbers of games were televised in these categories:

400-Mile Exceptions	41
Sellout Exceptions	24
Special Division I Exceptions	4
Divisions II, III Exceptions	17
Divisions II, III Exception Cablecasts	3
Sellouts on Educational Stations	1
Closed Circuit Telecasts	20
400-Mile Exception Cablecasts	3
Sellout Exception Cablecasts	7

The following list includes each member institution that appeared on any type of telecast administered by the committee during the 1981 season.

Appearances on NCAA Football Television Series and in Exception Telecasts, 1981

Institution	Series Telecasts	Exception Telecasts
1. Alabama	(N)R N	
2. Appalachian State	R	
3. Arizona		400 (2), CC
4. Arkansas	R R	
5. Arkansas State	R	
6. Army	(N)	
7. Auburn	N	
8. Augustana (S.D.)		RS
9. Baylor	R	
10. Boise State		SO (3), DC
11. Boston College	R	
12. Brigham Young	R R	CC
13. California	R R	400
14. Canisius		DEC (3)
15. Central Michigan	R R	
16. Cincinnati		SOC
17. Citadel	R	
18. Clemson	R R	CC
19. Dartmouth	R	
20. Dayton		DC
21. DePauw		DE
22. Drake	R	
23. Duke	R	
24. Duquesne		DE
25. Eastern Kentucky		400, DC (2)
26. Florida	R N	CC
27. Florida State	R R	400 (5), CC
28. Franklin & Marshall		RS
29. Fresno State	R	400 (3)
30. Georgia	R N (N)	CC
31. Georgia Tech	(N)	
32. Gettysburg		RS

Institution	Series Telecasts	Exception Telecasts
33. Grambling	R	
34. Harvard		CC
35. Hawaii	R	400 (3)
36. Houston	R R	
37. Idaho State		SO, DC (2)
38. Illinois		SE
39. Iowa	N R	CC
40. Iowa State		400
41. Ithaca		DE (6)
42. Jackson State	R	
43. Kansas	R	
44. Kentucky	R	400
45. Lehigh		SO
46. Louisiana State	(N)	400
47. Louisville	R	400
40. Miami (Fla.)	W R (ThF)	400(4)
49. Miami (Ohio)	R	
50. Michigan	N R	
51. Millikin		RS
52. Minnesota	R N	
53. Minnesota-Duluth		DE (2)
54. Mississippi State	R R	CC
55. Mississippi Valley St.	R	
56. Missouri	R N	SO (3)
57. Navy	R (N)	
58. Nebraska	N R	400, ETV
59. Nevada-Las Vegas	R	
60. Nevada-Reno		SO
61. New Mexico	R	400 (4)
62. North Alabama		RS
63. North Carolina	R R	
64. North Carolina State	R R	
65. North Dakota		RS
66. North Dakota State		DE, DC (2)
67. North Texas State		SE
68. Northern Michigan		DE (4), DC
69. Northwestern		400
70. Notre Dame	N (ThF)	400 (2), SO (7)

Institution	Series Telecasts	Exception Telecasts
71. Ohio State	R R	400
72. Oklahoma	R N	SO, SOC, CC
73. Oklahoma State	R	SO, 400C, SOC (2)
74. Oregon State	R	
75. Penn State	W R N	SO
76. Pittsburgh	R N	
77. Purdue	(N) R R	
78. St. Norbert		DE
79. Salisbury State		DE
80. San Diego State	R	400
81. San Jose State	R R	
82. Shippensburg State		DC
83. South Carolina	R R	CC (3)
84. South Carolina State	R	DC
85. South Dakota State		RS
86. Southeast Missouri St.		RS
87. Southern California	R N	400C
88. Southern Mississippi	R R	400 (2), SO
89. Southwest Missouri St.		RS
90. Southwest Texas State		DC (2)
91. Stanford	(N)	SOC
92. Syracuse	R	
93. Temple		SOC
94. Tennessee		400
95. Tennessee-Chattanooga	R	
96. Tennessee State	R	
97. Texas	N R	CC (2)
98. Texas A&M	R	
99. Texas Christian	R	400
100. Texas Tech		CC (2)
101. Toledo	R	
102. Troy State		RS
103. Tulane		400 (3)
104. Tulsa	R	400C, SOC
105. UCLA	R N	400
106. Utah	R	CC
107. Utah State		CC
108. Vanderbilt	R	

Institution	Series Telecasts	Exception Telecasts
109. Virginia		SO
110. VMI	R	
111. Virginia State		RS
112. Virginia Tech	R	SO
113. Virginia Union		RS
114. Washington		SO
115. Washington State	R R	SO
116. West Virginia	R	SE
117. Widener		RS, DC
118. Wisconsin	R R	
119. Wisconsin-Platteville		RS
120. Wisconsin-Stout		RS
121. Wyoming	R	SE
122. Yale	R R	CC

CODE

N—National Game
R—Regional Game
W—Wild-card Game
ThF—Thanksgiving Friday
( )—Free Appearance
400—400-Mile Exception Telecast
SO—Sellout Exception Telecast
400C—400-Mile Exception Cablecast
SOC—Sellout Exception Cablecast
ETV—Sellout on College's Educational Station
DE—Divisions II or III Exception Telecast
DEC—Divisions II or III Exception Cablecast
CC—Closed Circuit Telecast
SE—Division I Special Exception Telecast
DC—Divisions I-AA, II or III Championship
RS—Regular-Season Telecast of Division II or III game by ABC-TV

All-Time Appearances

On NCAA Football Television Series

Through 1981 Season

Institution	*Nat.*	*Reg.*	*Total*
Air Force	4	16	20
Akron	0	0	0
Alabama	29	15	44
Alcorn State	0	2	2
Appalachian St.	0	4	4
Arizona	0	13	13
Arizona State	2	13	15
Arkansas	18	24	42
Arkansas State	0	2	2
Army	30	15	45
Auburn	8	13	21
Ball State	0	0	0
Baylor	2	15	17
Bethune-Cookman	0	0	0
Boise State	0	1	1
Boston College	3	9	12
Boston Univ.	0	2	2
Bowling Green	0	3	3
Brigham Young	2	18	20
Brown	0	10	10
Bucknell	0	0	0
Dayton	0	1	1
Delaware	0	0	0
Delaware State	0	0	0
Denver**	0	1	1
Drake	0	1	1
Duke	6	13	19
East Carolina	0	5	5
East Tenn. St	0	0	0
Eastern Ky	0	1	1
Eastern Mich	0	0	0
Fisk	0	1	1
Florida	7	19	26
Florida A&M	0	1	1
Florida State	3	15	18
Fort Valley St	0	1	1
Fresno State	0	1	1
Fullerton State	0	0	0
Furman	0	2	2
Georgia	9	21	30
Georgia Tech	15	12	27
Grambling St	1	7	8
James Madison	0	0	0
Kansas	2	13	15
Kansas State	0	5	5
Kent State	0	5	5
Kentucky	1	7	8
Lafayette	0	0	0
Lamar	0	0	0
Lehigh	0	0	0
Long Beach St	0	0	0
Louisiana State	9	20	29
Louisiana Tech	0	1	1
Louisville	0	2	2
Maine	0	0	0
Marshall	0	0	0
Maryland	5	13	18
Massachusetts	0	5	5
McNeese State	0	2	2
Memphis State	0	2	2
Miami (Fla.)	11	12	23
Miami (Ohio)	0	3	3
Michigan	27	22	49

** Dropped football after 1960 season

Institution	*Nat.*	*Reg.*	*Total*
Buffalo*	0	1	1
California	7	21	28
Central Mich	0	7	7
Cincinnati	0	2	2
Citadel	0	3	3
Clemson	0	15	15
Colgate	0	4	4
Colorado	4	16	20
Colorado State	0	8	8
Columbia	1	1	2
Connecticut	0	1	1
Cornell	1	10	11
Dartmouth	1	15	16
Davidson	0	0	0
Nev.-Las Vegas	0	1	1
Nevada-Reno	0	1	1
New Hampshire	0	0	0
New Mexico	0	10	10
New Mexico St	0	3	3
Nicholls State	0	0	0
North Carolina	2	25	27
N. Carolina A&T	0	0	0
N. Carolina St	1	17	18
Northeastern	0	0	0
NE Louisiana	0	1	1
North Texas St	0	2	2
Northern Ariz	0	1	1

Institution	*Nat.*	*Reg.*	*Total*
Harvard	0	22	22
Hawaii	0	2	2
Holy Cross	2	8	10
Houston	6	10	16
Howard	0	0	0
Idaho	0	4	4
Idaho State	0	2	2
Illinois	6	25	31
Illinois State	0	0	0
Indiana	0	12	12
Indiana State	0	1	1
Iowa	10	16	26
Iowa State	0	8	8
Jackson State	0	3	3
Purdue	8	25	33
Rhode Island	0	0	0
Rice	2	11	13
Richmond	0	2	2
Rutgers	0	2	2
San Diego St	1	5	6
San Jose State	0	10	10
S. Carolina	1	11	12
S. Carolina St	0	2	2
SE Louisiana	0	0	0
Southern-B.R	0	0	0
Southern Cal	34	19	53
Southern Ill	0	0	0

Institution	*Nat.*	*Reg.*	*Total*
Michigan State	17	22	39
Mid. Tenn. St	0	0	0
Minnesota	9	23	32
Mississippi	6	17	23
Mississippi St	1	4	5
Miss. Valley St	0	2	2
Missouri	9	22	31
Montana	0	2	2
Montana State	0	0	0
Morehead St	0	1	1
Morgan State	1	0	1
Murray State	0	1	1
Navy	30	15	45
Nebraska	20	17	37
Tulane	0	6	6
Tulsa	1	9	10
UCLA	30	19	49
Utah	1	7	8
Utah State	0	7	7
Vanderbilt	1	2	3
Villanova*	0	3	3
Virginia	0	2	2
Va. Military	0	5	5
Virginia Tech	0	7	7
Wake Forest	0	7	7
Washington	6	27	33
Washington St	1	15	16

* Dropped football after 1970 season
* Dropped football after 1980 season

Institution	*Nat.*	*Reg.*	*Total*
Northern Ill	0	0	0
Northwestern	5	14	19
NW Louisiana	0	1	1
Notre Dame	38	24	62
Ohio	0	5	5
Ohio State	24	27	51
Oklahoma	28	22	50
Oklahoma St	1	6	7
Oregon	3	17	20
Oregon State	2	11	13
Pacific	0	1	1
Pennsylvania	1	3	4
Penn State	19	23	42
Pittsburgh	19	15	34
Portland State	0	0	0
Prairie View A&M	0	0	0
Princeton	1	12	13
Southern Meth	5	20	25
Southern Miss	0	3	3
SW Louisiana	0	2	2
Stanford	10	25	35
Syracuse	5	19	24
Temple	0	1	1
Tennessee	8	16	24
Tenn.-Chatt	0	2	2
Tennessee St	0	2	2
Texas	34	23	57
Texas A&M	17	19	36
Texas-Arlington	0	0	0
Texas Christian	2	7	9
Texas-El Paso	0	0	0
Texas Southern	0	1	1
Texas Tech	4	18	22
Toledo	0	3	3
Weber State	0	0	0
West Texas St	0	2	2
West Virginia	0	7	7
Western Caro	0	1	1
Western Ky	0	1	1
Western Mich	0	1	1
Wichita State	0	3	3
William & Mary	0	2	2
Wisconsin	4	20	24
Wyoming	0	14	14
Yale	1	19	20

4. College Football Attendance

National

Record years by the Southeastern and Southwestern conferences and the Eastern and Southern independents, plus big increases by the Ivy League and Mid-American conferences all helped college football attendance reach another all-time national high in 1981.

The increase was 266,065 spectators, making the total 35,807,040 for *all* 648 four-year colleges in the United States with varsity teams (497 are NCAA members). It was the 27th increase in the last 28 seasons. College football attendance climbed in 1954 over 1953 and has gone up every year since, except for a tiny drop in 1974.

Since 1954—third year of the NCAA Television Plan—national attendance has more than doubled, from 17.0 million then to 35.8 million now.

#Teams	*Millions	%Up	#Teams	*Millions	%Up
1948—685	19.1	—	1965—616	24.7	5.69
1949—682	19.7	2.71	1966—616	25.3	2.40
1950—674	19.0	-3.51	1967—610	26.4	4.57
1951—635	17.5	-7.81	1968—612	27.0	2.25
1952—625	17.3	-1.10	1969—615	27.6	2.22
1953—618	16.7	-3.51	1970—617	29.5	6.66
1954—614	17.0	2.20	1971—618	30.5	3.36
1955—621	17.3	1.28	1972—620	30.8	1.23
1956—618	18.0	4.43	1973—630	31.3	1.47
1957—618	18.3	1.44	1974—634	31.2	-0.15
1958—618	19.3	5.41	1975—634	31.7	1.45
1959—623	19.6	1.74	1976—637	32.0	1.02
1960—620	20.4	4.02	1977—638	32.9	2.79
1961—616	20.7	1.34	1978—643	34.3	4.09
1962—610	21.2	2.66	1979—643	35.0	2.24
1963—616	22.2	4.76	1980—642	35.5	1.49
1964—622	23.4	5.02	1981—648	35.8	0.75

All four-year U.S. colleges with varsity teams.
* Millions rounded off; percent of change based on exact change in total attendance.

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8. Telecast Schedule and Ratings

Continuing the improvement seen a year ago, television ratings of the NCAA series climbed to 12.0 in 1981, up from the 11.5 percent average achieved in 1980 and back to the 1978 level.

In addition, NCAA football was viewed in an average of 9,780,000 homes, more than a half-million more than last year and the second-highest homes average in the history of the series.

A national double-header on November 28 highlighted this year's telecasts. The opening game, Penn State vs. Pittsburgh (ranked No. 1 at that time), had a rating of 14.8. That telecast was followed by Alabama vs. Auburn, featuring coach Paul "Bear" Bryant's record-setting 315th victory; the Alabama/Auburn game drew a 17.3 rating and was seen in an average of more than 14 million homes.

Other key 1981 telecasts included:

—Regional presentation featuring Oklahoma vs. Southern California on September 25 (14.3).

—National telecast of Penn State vs. Miami (Fla.) on October 31 (14.5).

—National telecast of UCLA vs. Southern California on November 21 (15.5).

Also, the annual Army/Navy game on December 5 and a regional presentation highlighted by Ohio State/Michigan on November 21 each had a 13.8 rating.

Following are comparative ratings figures for the series since the current ratings system was adopted in 1968:

Year	Rating	Homes	Share
1968	12.9	7,400,000	37
1969	13.9	8,200,000	38
1970	13.8	8,300,000	36
1971	14.0	8,700,000	38
1972	13.3	8,600,000	35
1973	12.2	8,000,000	34
1974	12.0	8,200,000	33
1975	13.2	9,200,000	35
1976	14.1	10,040,000	37
1977	13.2	9,620,000	37
1978	12.0	8,900,000	35
1979	11.4	8,700,000	33
1980	11.5	9,190,000	33
1981	12.0	9,780,000	32

1981 NCAA Football Television Ratings

Date	Visitor/Home Team		Total Stations	Total Audience	Total Homes (000)	Average Audience (Rating)	AA Homes (000)	Share
9-5	Alabama/Louisiana State		204	22.6	18,420	11.1	9,050	22
9-12	Stanford/Purdue		201	20.3	16,540	7.4	6,030	22
9-19	Notre Dame/Michigan		207	24.9	20,290	11.7	9,540	36
9-26	Boston College/North Carolina	46						
	Oregon State/Minnesota	77	212	21.2	17,280	8.1	6,600	28
	Florida/Mississippi State	48						
	San Jose State/California	41						
9-26	Oklahoma/Southern California	207						
	Appalachian State/Citadel	4	213	30.3	24,690	14.3	11,650	32
	Jackson St./Mississippi Valley	2						
10-3	Purdue/Wisconsin	92						
	Arkansas State/Kansas	21						
	Clemson/Kentucky	55	213	22.1	18,010	9.3	7,580	31
	Baylor/Houston	24						
	Navy/Yale	21						
10-3	San Jose State/Fresno State	23						
	Nevada-Las Vegas/Wyoming	32						
	Missouri/Mississippi State	83	209	24.3	19,800	10.0	8,150	24
	Pittsburgh/South Carolina	71						
10-10	Oklahoma/Texas		211	20.6	16,790	8.7	7,090	28
10-17	Texas/Arkansas	99						
	UCLA/Washington State	31						
	Brigham Young/San Diego State	22	210	27.8	22,660	12.1	9,860	30
	Central Michigan/Toledo	13						
	Georgia/Vanderbilt	45						
10-24	Nebraska/Missouri	137						
	Minnesota/Iowa	81	215	25.9	21,110	12.0	9,780	38

Date	Visitor/Home Team		Total Stations	Total Audience	Total Homes (000)	Average Audience (Rating)	AA Homes (000)	Share
10-31	Ohio State/Purdue	106						
	Dartmouth/Yale	16						
	N. Carolina State/S. Carolina	41	215	25.4	20,700	10.7	8,720	36
	Drake/Tulsa	15						
	Houston/Texas Christian	37						
10-31	Penn State/Miami (Fla.)		214	31.4	25,590	14.5	11,820	34
11-7	Clemson/North Carolina	67						
	Miami (Fla.)/Florida State	12						
	Miami (Ohio)/Central Michigan	13	216	23.9	19,480	10.9	8,880	36
	Nebraska/Oklahoma State	88						
	Utah/New Mexico	36						
11-7	Georgia/Florida		212	29.3	23,880	14.0	11,410	34
11-14	Alabama/Penn State	112						
	Iowa/Wisconsin	82	211	25.9	21,110	11.9	9,700	37
	North Carolina/Duke	17						
11-14	Arkansas/Texas A&M	121						
	California/Washington State	26						
	Southern Miss./Florida State	28	211	26.0	21,190	12.0	9,780	27
	Grambling/South Carolina State	4						
	Brigham Young/Hawaii	29						
	Tenn. St./Tenn.-Chattanooga	3						
11-21	Ohio State/Michigan	186						
	Southern Mississippi/Louisville	11	213	28.5	23,230	13.8	11,250	40
	West Virginia/Syracuse	10						
	Virginia Military/Virginia Tech	6						
11-21	ULCA/Southern California		213	33.1	26,980	15.5	12,630	33
11-27	Notre Dame/Miami (Fla.)		208	26.0	21,190	11.6	9,450	30
11-28	Penn State/Pittsburgh		215	27.9	22,740	14.8	12,060	42
11-28	Alabama/Auburn		211	33.6	27,380	17.3	14,100	38
12-5	Georgia/Georgia Tech		215	23.9	19,480	9.8	7,990	32
12-5	Army/Navy		215	29.0	23,640	13.8	11,250	32
SEASON AVERAGE			211	26.3	21,430	12.0	9,780	32

KEY FOR RATINGS TABLE

Total Audience: audience viewing all or any part of program in excess of five minutes, reported in two ways:

(a) In percent of U.S. TV households.

(b) In terms of the projected number of households reached.

Average Audience: number of TV households tuned to program during average minute, reported in two ways:

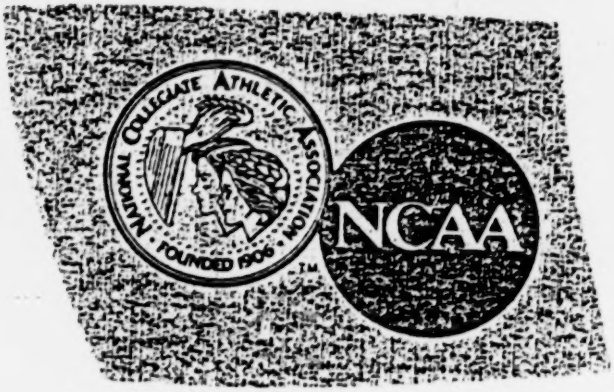
(a) In terms of total viewers.

(b) In terms of the projected number of households reached.

Share of Audience: audience during average minute of program, in percent of households using television at time program was telecast.

DEFENDANT'S EXHIBIT G

Football Television Briefing Book



NCAA Football Television Committee
1981

INTRODUCTION

NCAA Football Television

Managing the televising of college football games has been part of the NCAA's responsibility the past 30 years. The Association now is entering the final year (1981 football season) of its latest contract, a four-year pact with the American Broadcasting Company. That agreement provided for revenues in excess of $30 million per year, compared to the initial $1.1 million agreement with the National Broadcasting Company in 1952.

Considering the financial stakes involved, and the remarkable growth of the program, the NCAA Football Television Committee concluded that this review might be useful in providing an informational basis to be used by interested officials of member institutions in appraising the decisions of NCAA television committees.

The NCAA Television Committee does not intend to portray this booklet as a "neat little package" that answers all of today's television questions. We hope it will serve, however, as a manual to inform representatives of NCAA members of trends and developments in today's television world.

Sports television first occupied the attention of the NCAA at the Association's 1948 Convention. At that time, there were 16 television stations in operation in the United States. In 1947, there were 7,000 sets in use across the country. Today, there are 78,000,000 television homes; and advanced technology is providing the viewer with cable, pay cable, videodisc and recording options that were only theoretical concepts a relatively short time ago. Certainly, today's athletic administrator needs to remain abreast of the industry's developments.

Included in the following pages are a history of the NCAA Football Television Plan, including the financial development of that plan; a discussion of the state of the television industry today, particularly related to sports television; a description of the technological advances that are likely to follow, and an examination of television ratings over the past few years and the factors that affect those ratings.

We hope the information will assist you in evaluating NCAA policies and programs in this important area of college athletic management.

WILES HALLOCK, Chair
1981 NCAA Football Television
Committee

CHAPTER ONE

The NCAA and Television Controls

In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:

1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;
2. To spread television among as many NCAA member colleges as possible; and
3. To provide football television to the public to the extent compatible with the other two objectives.

That first Television Plan encompassed 12 national telecasts during the 1952 season. The National Broadcasting Company (NBC) was the carrying network, and the rights fees paid to participating institutions totaled $1,144,000; 22 institutions appeared on the telecasts. After a year of operation, the Television Committee added an important fourth objective: "To strive for enduring principles appropriate for utilization in television plans for future years."

College football television had begun in 1938, when one of the University of Pennsylvania's games was beamed from Franklin Field to the Philco offices-laboratories, also in Philadelphia. As far as is known, there were six television sets in Philadelphia; and all were tuned to the game.

Ten years later, discussion of television began occupying a great deal of time at NCAA Conventions. The major issue was the adverse effect that televising could have on in-stadium attendance. Early television had little effect because signals could be beamed only to local areas, and there were few receiving sets.

There were only 7,000 sets in use nationwide in January 1947. By 1955, there were an estimated 30,000,000 sets. Currently, there are 78,000,000 television households (more than 98 percent of the nation's homes are equipped with one or more television sets).

The concern for in-stadium attendance became an area of major interest and concern to the Association during the late 1940s. Three studies were reviewed prior to establishment of the Television Plan in 1952, all examining the effects of television on attendance:

1. The 1949 Convention received a report from Crossley, Incorporated, of New York. The report measured only four Eastern cities and thus was not fully representative; however, it did indicate a relationship between nonattendance and interest in television. A portion of the study that specifically measured nonattendance noted that 21.8 percent of the television viewers questioned did not attend a game because they preferred to watch the event on television.

2. In 1952, a survey was conducted by Jerry N. Jordan of the University of Pennsylvania. His analysis indicated that college football had made "a remarkable record in attendance over the past four years" but that colleges in television areas had not fared as well during that period as those in nontelevision areas.

3. The National Opinion Research Center (NORC) was commissioned by the NCAA to conduct a nationwide survey concerning the impact of television upon attendance. A preliminary report to the 1951 Convention showed that during the 1949 and 1950 seasons, college football attendance had declined by 3.5 percent. Attendance for colleges in television areas had dropped six percent, while those outside television areas experienced a 2.5 percent increase.

The NORC's final report for 1952, released on April 8, 1953, verified that live telecasting of college football games again damaged the gate in 1952 and that this harm was reduced appreciably by the NCAA's exercise of control over telecasting. Of particular interest was the fact that in areas where there was no television competition in 1952, paid admissions were 10.5 percent better than in the pre-TV years 1947-48; but where television competition was present, attendance was down 16.2 percent.

That NORC report was the beginning of a continuing documentation of damage caused to in-stadium attendance by television of live events. The Television Committee at that time found some indications that attendance was higher on blackout Saturdays than when a game was televised but was "unable to find these differences consistently enough or to a large enough degree to prove the matter mathematically."

Several examples of apparent attendance damage were cited, including a Mid-American Conference game between Miami (Ohio) and Cincinnati, to decide the conference championship. Normal attendance for the game had been 30,000; in 1951, it was played the same date the Michigan/Ohio State game was telecast in the Cincinnati area, and attendance dropped to 16,000.

In addition, at the 1951 Convention, Reaves Peters of the Big Seven Conference (now Big Eight) reported that the University of Oklahoma had suffered a drop in ticket sales in Oklahoma City of 15,000 per year in 1949 and 1950 and attributed the decline to televising of its football games.

Efforts to document attendance damage since 1951 generally have followed the specific example approach. Major league baseball has been particularly active in this regard, including the following instance:

> The Pittsburgh Pirates finished one game out of first place in 1978 and became world champions in 1979; the Pirates

are a team that traditionally has attracted a large home gate. However, Pittsburgh was 21st in major league attendance in 1978 and 18th in 1979. Cable television penetration in Pittsburgh reached 33 percent by September 1, 1978, with WOR-TV (New York Mets), WTCG-TV, now WTBS (Atlanta Braves) and WPIX-TV (New York Yankees) bringing more than 300 professional baseball telecasts into the Pittsburgh area in a single season. Those stations did not reach Pittsburgh until the 1976 season; in 1975, the Pirates' attendance ranked ninth in the major leagues.

The NCAA documented apparent damage to in-stadium attendance in Columbus, Ohio, related to Warner Cable (Qube) telecasts of Ohio State football games during 1978 and 1979. A study of responses viewers gave during these cablecasts to the question, "Would you have attended another college football game if this game had not been televised?" indicated that 1,138 spectators per weekend in the Columbus area (of an average Qube viewing audience of 21,500) were lost to college football because of the Ohio State cablecasts.

The first NCAA Television Committee was composed of Ralph Furey, Columbia University; Willis O. Hunter, University of Southern California, and Thomas J. Hamilton, University of Pittsburgh. It was appointed in 1950 to study the problem of football television. The 1951 Convention approved a moratorium on televising college football games in 1951, increased the committee's membership to include one member from each NCAA district and directed the committee to develop a plan whereby the televising of college football games could be controlled.

That plan, submitted to the 46th annual Convention, January 10-12, 1952, established the machinery by which NCAA-controlled television could be implemented. The 1952 season marked the beginning of the program that still serves the interests of college football today.

The National Broadcasting Company (NBC) was the original carrying network of NCAA football, telecasting 12 national games in 1952 and a package in 1953 that involved 11 national games and eight regional presentations on two dates. In those two years and in the 1954 contract with the American Broadcasting Company (ABC), a team was permitted one appearance per year on the series.

In 1955, the Association's series moved back to NBC for the start of a five-year relationship. Also at this time the appearance limit was raised to two per year, the basic rule still in effect (five appearances in two years are permitted in special circumstances). The 1955 contract also saw the beginnings of a new kind of regional package. Limited regional televising had been included in the 1953 and 1954 seasons, but the 1955 arrangement expanded the regional presentations to five dates. In addition, the format basically permitted each region of the country to determine its own regional package for those dates rather than the system used today whereby the carrying network selects and produces the regional telecasts. One effect of this new regional philosophy was the televising of college football on more than one network in some parts of the country. The "independent" regional system remained in effect through 1959, varying from three to five Saturdays per year.

Beginning in 1960, the NCAA package began to take on more of the features included in today's telecasts. ABC was the carrying network, and the series included nine national and four regional exposures—all handled by ABC. For the first time, the rights for the series surpassed $3 million ($3,125,000); and Curt Gowdy replaced Lindsey Nelson as the primary voice of college football.

The character of the series changed again in 1964 when NBC began a two-year contract. At that time, the number of games within each regional exposure was increased to four, which resulted in a rise in the number of teams appearing on the series. Generally, about 35 different institutions had been

appearing each year; with the new arrangement, approximately 50 appeared each season. That number remained relatively constant through 1977, even though the number of national telecasts in the package climbed from eight to 13.

In 1966, ABC again took over as the carrying network, beginning a relationship that has extended through the current contract. Chris Schenkel, Bud Wilkinson and Bill Flemming were the primary announcers that first year; Keith Jackson took over as the voice of college football in 1975, with Wilkinson being supplanted by former and current college coaches the same year.

ABC's current contract started with the 1978 season and marked a new course. It was the first four-year pact; in addition, there was a 15 percent increase in the number of telecasts, from 20 to 23 (13 national, 10 regional), and the number of annual team appearances increased 41.5 percent.

The number of games within each regional presentation also was increased, with 45 games being required among the 10 regional exposures. That 4.5 ratio was the largest in the history of the series.

Corresponding with the growth in telecasts has been a greater growth in the financial aspect of the series. The initial NBC contract had a rights fee of $1,144,000, and through the 1950s the value of the package remained under or near $2 million.

In 1960, however, ABC provided an agreement worth $3,125,000 per year, a 42 percent increase from the 1959 NBC agreement. In 1962, CBS paid $5,100,000 for the rights, a gain of more than 63 percent.

The next three contracts saw increases to $6,522,000, $7,800,000 and $10,200,000. Thus, by the end of the decade, the value of the NCAA football contract stood 226 percent higher than in 1960.

The financial gains continued throughout the 1970s; however, the largest increase came with the current four-year agreement. ABC had paid $18 million per year for the 1976 and 1977 rights; with the new contact, the fee jumped to $29 million per year for the first two years and $31 million per year the second two years, due in no small part to the increased number of telecasts and the resultant increase in salable commercial time.

According to some industry analysts, the 1977 NCAA agreement with ABC made history in the sports world. Mike Trager, senior vice-president and media director at D'Arcy-MacManus and Masius in New York, said: "It (huge contract escalations) started out with the NCAA football franchise . . . ABC-TV reacted to that pressure (expressed interest of the NCAA committee in dividing the series between two networks) by probably paying at that point more than the franchise was worth. It was a huge escalation. . . and it set the tone for every other negotiation that occurred after that point."

Within the $31 million, a total of $750,000 was paid for the Division I-AA football championship television rights, $520,000 for the Division II football championship and $150,000 for television rights to the Division III football championship. In addition, institutions that appeared on the Divisions II and III regular-season telecasts collected $165,000; while the rights fees for five NCAA championships televised by ABC totaled $250,000.

Payments to institutions in Division I that appeared on the 1980 series totaled $26,831,800; i.e., $31 million less the above-cited rights payments and the assessments of 4.5 percent for general NCAA operations and 3.5 percent for the championships transportation guarantee fund. A rights fee of $600,000 was paid for each of the 12 national games telecast by ABC on the regular fall series, and $426,779 was paid for each of the 46 regional telecasts in 1980.

The first NCAA assessment on the Series rights fees in 1952 was 12 percent; after declining to seven percent in 1953, it

fluctuated between three and four percent over the next 13 years. The basic assessment on the series rights fees now is the traditional 4.5 percent. This assessment (which funds the NCAA postgraduate scholarship program, football promotion, television administration, sports development and general administration) has been in effect since 1967.

In 1978, the NCAA Executive Committee established a new 3.5 percent assessment. That money ($950,775 initially; $1,020,775 for 1980) was earmarked, along with other Association funds, for payment of transportation expenses for all student-athletes competing in NCAA championship meets and tournaments.

As illustrated in Table 1, Division I members received $27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was $625,195 (2.0 percent), while Division III received $385,195 (1.3 percent) and the NCAA $2,147,425 (6.9 percent). (Note: Tables appear following conclusion of text in each chapter.)

The 3.5 percent assessment above for the travel expense guarantee fund resulted in $1,020,775 for 1980, and the allocation of that money among the three divisions reflects payments to the institutions of participants in various NCAA championships. The table also indicates the NCAA received $835,000 as its share of the net receipts from the Division I-AA, II and III football championships and five other events telecast by ABC (gymnastics, outdoor track and field, swimming, wrestling and volleyball). The fact that these eight events accumulatively have net receipts is a direct result of the travel expense guarantee program, which in 1979-80 cost $4,091,021. Of this amount, 25 percent was met by the 3.5 percent football television assessment and 75 percent by Division I basketball tournament receipts.

Due to revenue-sharing arrangements in most of the major conferences, income from the series is spread among a substan-

tial number of institutions. In 1980, for example, the $26,831,800 paid by ABC to the 81 teams appearing on the series actually was shared by 148 institutions.

As mentioned earlier, stadium attendance was one of the big concerns at the time controlled football television first was being considered. Several institutions had reported drops in attendance during the period of uncontrolled television.

In 1950, college football attendance stood at 19 million persons nationwide. That figure was down 3.51 percent from the previous year; and the attendance drop continued in 1951, the year NCAA members placed a moratorium on college football television.

Controlled television did not bring about an immediate reversal in this trend, with attendance declining to 17.3 million in 1952 (the first year of the plan) and finally to 16.7 million in 1953. Beginning in 1954, though, national attendance started to climb, first by 2.20 percent to 17 million. Since that first increase 27 years ago, college football attendance has more than doubled, to an all-time high of 35.5 million during the 1980 season (see Table 2).

Another of the NCAA Television Committee's original goals was to forestall the creation of a "TV aristocracy"; i.e., a few institutions monopolizing all of the major television opportunities. The current rules of the plan (1980 series) resulted in 81 member institutions sharing in the 116 possible appearances on the national series.

For the sake of discussion, assuming there are 79 teams categorized as being in that first tier of Division I-A, those members participated in 1980 at the rate of 1.15 appearances per institution. The remaining appearances were as follows:

> Second Tier, Division I-A—15 appearances, 60 institutions, 0.25 appearances per institution.

Division I-AA—10 appearances, 46 institutions, 0.22 appearances per institution.

During the first three years of the current ABC contract, the first-tier teams have averaged 88.67 appearances per year, while second-tier teams have averaged 17 appearances and Division I-AA 10.33 appearances per year.

During the 1972-1977 period, first-tier teams averaged 67.67 appearances per year (86.2 percent of the total), while the second tier annual average was 8.50 (10.8 percent) and Division I-AA 2.33 (3.0 percent). It should be noted that Division I-AA was not created until 1978, so the 1972-77 figure reflects appearances by institutions that later became members of Division I-AA.

Nonetheless, the increase in appearances for so-called first-tier teams between the two periods is 31 percent.

Current NCAA restrictions limit a team to five appearances over a two-year period, which serves to encourage the expanded distribution mentioned above. Distribution of the series appearances also affects distribution of revenue from the series. As mentioned earlier, most conferences have revenue-sharing policies so that even institutions that do not appear on series telecasts share in the proceeds from the NCAA series. The pool that is shared in those arrangements, though, comes exclusively from rights payments from ABC to institutions appearing on the series. Table 3 shows the distribution of revenue from the 1980 telecasts. The values of the national and regional appearances used in the table assume a 50-50 split between participating institutions in all cases. Since ABC pays the money directly to the home team, this division cannot be validated by the NCAA, since it is not privy to the relevant game contracts.

In addition to the revenue generated by the series, NCAA member institutions rely heavily on income from ticket sales for home football games. It already has been documented that

college football attendance is at an all-time high; with that increase in fans has come a corresponding gain in dollars generated from ticket sales, a primary objective of the current NCAA television controls.

Shown in Table 4 are projected increases in revenue from attendance patterns in each NCAA membership division over the past three years. Since there are no documented figures for average ticket prices, estimates were made for each division for use with attendance totals compiled by the NCAA. Just as the preponderance of television appearances and television revenue has accrued to the Division I-A members, those institutions have benefited most from the increased attendance, which perhaps is a result of the television controls. Indeed, of the projected revenue increase of $17,669,571 among NCAA members, $16,620,126 (94.06 percent) occurred in Division I-A. The table also indicates that the majority of the increase in attendance occurred in Division I-A.

Another continuing area of concern to the administrators of NCAA football television is the overall popularity of the telecasts. Although the audience measurements conducted by the television industry will be discussed in detail later, the general popularity of the NCAA series can be examined at this point.

Tables 5, 6 and 7 show the television industry's measurements of NCAA football popularity since 1968, when the current ratings system was introduced. Table 5 shows the changes during that time in NCAA football ratings ranging from a high of 14.1 in 1976 to a low of 11.4 in 1979. Twice, NCAA football has climbed to a rating of 14 or better, only to decline in subsequent years to a lesser rate of popularity.

In Table 6, the growth in households watching NCAA football is documented. Although the 1980 total of 8,930,000 fell considerably short of the 1976 peak of 10,040,000, it still was 20.68 percent higher than the 1968 level. The growth in

television homes despite fluctuating ratings reflects the increased number of homes in the country with television. As of January 1981, the total was approximately 78 million.

The NCAA's share of the television audience is shown in Table 7, with a range from 33 to 37 over the past 13 years. During the past two seasons, NCAA football has captured one-third of the audience on Saturday afternoons.

A later chapter will discuss factors influencing the ratings of NCAA football.

With the popularity of NCAA football again nearing the nine million mark in television viewers, with nationwide attendance now more than twice the level of the early 1950s and with ticket revenue increasing at most major colleges, the validity of the NCAA Television Plan would appear to be confirmed.

To test that opinion, the Association conducted a survey in January 1981 among its membership. The results indicated substantial satisfaction with the plan and its administration.

In particular, most institutions responding to the survey indicated they saw no need to alter the current national series appearance rule and believed the current plan to be satisfactory in providing the greatest possible exposure while protecting in-stadium attendance.

Following is a summary of some of the more significant responses to the survey:

1. As discussed earlier, the NCAA Television Plan attempts to maintain significant television exposure and income for as many NCAA member institutions as feasible, while protecting in-stadium attendance for all football-playing colleges to the greatest degree possible. Responses indicated that 75.3 percent believe the current plan strikes a good balance between those two elements; 72.8 percent of Division I respondents agreed.

2. The number of exposures and team appearances within those exposures also met with the approval of the membership, with 49.7 percent (52.1 percent in Division I) supporting the current totals. Approximately 14 percent favored an increase in team appearance opportunities within the current 23 exposures.

3. The current team appearance limitations were favored by 56.3 percent of the respondents, including 58.6 percent in Division I. Further limits on a given team's appearances were suggested by 14.4 percent, while only 6.9 percent favored relaxing the appearance rules.

4. Answers to whether the NCAA should keep the series on a single network or pursue a two-network approach were mixed, with 21.4 percent opting for two networks and 23.5 percent favoring the current system. In addition, 38.5 percent (40 percent in Division I) indicated the subject was too complex for a precise answer—without considerable research and investigation. Those institutions believed the Football Television Committee must make the decision after receiving presentations from each network and other interested communications companies.

5. Nearly all institutions responding (88.2 percent overall, 90.1 percent in Division I) agreed that the current four-year agreement has worked as well as earlier two-year plans; however, 69.2 percent (64.4 in Division I) suggested the committee proceed for only two years in order to retain a flexible position.

6. Rules regarding exception telecasts were discussed in the survey, with the majority of institutions indicating opposition to relaxation of exception telecast regulations. Concerns included letting institutions in major markets utilize pay television in a manner that would place them at an advantage in relation to other mem-

ber colleges and the appreciable damage that could be caused to attendance at games in areas where conflicting games were telecast.

7. Responses were divided concerning the appropriate number of national and regional telecasts in the NCAA series. Most institutions favored increasing the number of regional telecasts; a significant number of institutions suggested a format with 10 national/13 regional as opposed to the current 13 national/10 regional.

8. Guaranteed appearances for Division I-AA should be continued, according to 55.7 percent of the respondents (60 percent in Division I). The number of appearances would be based on the size of the membership division.

DEFENDANT'S EXHIBIT B-1

ROUND TABLE MEETINGS

LARGE COLLEGE AND UNIVERSITY GROUP

Thursday Afternoon, January 11, 1951

The N.C.A.A. Round Table Meeting of the Forty-fifth Annual Convention of the National Collegiate Athletic Association convened at two twenty-five o'clock in the Grand Ballroom, Hotel Adolphus, Dallas, Texas.

CHAIRMAN K. L. WILSON: Gentlemen, I don't suppose that we have had any item for years that has occupied as much of our time and attention and had as much been written about as the subject of television.

There are a lot of things I would like to say, but inasmuch as we have a very competent number of speakers who are going to take up the subject we will go right into the subject without further ado.

This is the annual N.C.A.A. Round Table Session, and our meeting today will be devoted to the subject of television and its effect on sports attendance, particularly college football. This promises to be a lengthy session, so I will dispense with any opening remarks except to call your attention to the action taken by the N.C.A.A. at its last convention in New York.

The following motion was adopted:

"We recommend the immediate appointment of an active and representative television committee of the National Collegiate Athletic Association with instructions that that committee make a thorough investigation of all material now available and report to the Executive Committee of the National Collegiate Athletic Association at the regular June meeting. Furthermore, if the study of the television committee indicates that action of any type should be necessary, that steps be instituted to provide for amendments to the Constitution of the National

Collegiate Athletic Association in order that television be properly controlled.

"Pending any possible action at the 1951 convention, we urge that the National Collegiate Athletic Association recommend to its members that no television commitments be made beyond the 1950-'51 college year."

* * *

CHAIRMAN WILSON: We are now ready to hear the report of the Television Committee. It is a pleasure again to reintroduce Tom Hamilton who spent so much time and work on this report.

MR. HAMILTON: I would like to read at this time a report that your committee, Ralph Furey, Bill Hunter and I, have prepared.

In making this report to you the Television Committee fully realizes that we are dealing with one of the major scientific developments in modern life, and we present our information and views to you with a very real sense of humility and a realization of the inadequacy of mere individuals attempting to interpret and understand the whole scope of a communication revolution. Many of us have witnessed the great changes in American life from the introduction of the automobile, the changes of habit that have come with the introduction of the telephone, and then the radio. We have seen the change from silent pictures to sound, from black and white to color, and realize that this is an ever-changing and progressive world. We have witnessed the absorption of these technological advances into the full pattern of our daily and economic life.

When it is recognized that television may very well prove to be one of the biggest technical and economic changes to appear on the horizon of this generation—plus the fact that television may also turn out to be the greatest motivating force for social and cultural change for possibly several gener-

ations—it should indicate the need for most careful thinking and action by people caught in television's path.

Today we all meet here more or less like a Board of Trustees to study and evaluate the effect of a new scientific development on our work and responsibilities. Individually and collectively we direct the destinies and control the fate of athletics and physical training of our young men and women in an early formative period of their lives. These activities will go forward for greater benefit or retreat in accordance with our collective wisdom and energy. Therefore, we sincerely recommend that you devote serious thought and study to the subject of television, for whether or not it has affected you as yet, it is a certainty that it will.

Television first made its appearance about ten years ago and a sports program of the University of Pennsylvania football games was produced in 1940 with only 700 television sets in Philadelphia. Since 1946 there has occurred a most phenomenal growth of this infant industry. This table shows some of the picture of this growth.

Date	Sets	Date	Sets
Jan. 1 1947 —	7,000	Jan. 1 1950 —	3,950,000
Jan. 1 1948 —	190,000	Jan. 1 1951 —	10,500,000
Jan. 1 1949 —	1,000,000	Jan. 1 1955 —	30,000,000

As of January 1, 1951, with an estimated 9,200,000 television sets, there are 107 stations servicing 63 markets. By the same date 1952, baring war curtailment, there will be about 14,000,000 sets. By 1955 it is believed there will be some 30,000,000 sets in use and a possible 1200 stations. When we consider that there are now some 81,000,000 radio sets produced, and with the advance of television, we must recognize that we are dealing with a terrific force like a powerful wind of gale velocity. We are already feeling the first breezes of this hurricane, and knowing the devouring strength of the vortex of this cyclonic power, it behooves us to plot our course to the safe semi-circle of this storm, and like the great clipper ships of

sailing days, use the helping winds to ride more swiftly toward our own goals.

This committee has concerned itself primarily with the effect of television on college football and most of this report will pertain to that field. However, the subject is so large and is influencing other activities so much that we would be foolish not to observe what is happening in other areas.

Take the movie industry. Surveys conducted in New York show that television owners went to the movies 20 to 30 per cent less often and tabulations of amusement tax receipts from Chicago theaters in 1949 show a decline every month in theater business. For the last six months in 1949, the average decrease was 12.13 per cent. Then in the month of January, 1950, the drop was 23.40 per cent. In Columbus with 71,000 sets in use, taxes from movies showed a decrease for 1950 of 20.25 per cent. Harrisburg, which has practically no television, showed for five months an increase of 6.31 per cent. Out of some 19,000 movie houses in the United States, 680 closed their doors between January 1, 1950, and July 1, 1950. At the same time in Canada, which has practically no television, attendance at movies increased, and 562 new theaters opened their doors.

We have received statements that most other sports have felt the adverse effect of television on their attendance with one or two exceptions like the "Roller Derby." Professional boxing, in particular, has been hurt. It was reported that 25,000,000 people saw the Louis-Charles heavyweight title fight on television, although the ring attendance was only 22,000. The gate was $205,370, compared to a $262,000 gate for a featherweight title fight that was not televised.

Jerry Jordan has presented an excellent report on major and minor league attendance in baseball. He enumerates five major factors affecting baseball attendance in 1950, which caused the majors to drop off 13.7 per cent and the minors 19 per cent, which represents a loss of 8,000,000 customers. Three minor leagues and thirteen teams have folded. The minor

leagues are seriously concerned over the effect of major leagues' radio and television competition which caused their revenue to be curtailed. The franchise of Newark has been shifted to Ottawa, Canada, like the Jersey City team which moved to Springfield, Massachusetts, on account of the radio and television competition with Yankee, Giant and Dodger aircasts. Pacific Coast, International League and American Association attendance in 1950 all decreased by more than 500,000 each. There is a strong feeling that when co-axial cables make the telecasting of major league games available in any community, it will be impossible for the minor leagues to continue at all unless some effective method of controlling the major league telecasts is permitted.

Final professional football statistics are not available to us at this time, but as of November 2nd, with forty-two games played in 1950 versus forty-one in 1949, the total attendance for 1950 had dropped by 85,530 fans, with six teams ahead in attendance and seven below 1949 figures. Probably the most interesting situation was given by the Los Angeles Rams. In 1949 the Rams and the Bears drew 86,080 fans at Los Angeles not televised, and in 1950 when they televised, only 18,219 showed up. Yet in a play-off game at the end of the season without television, the same two teams drew 83,501.

The Los Angeles Rams were the only professional team that televised in their own local area.

However, in all the foregoing cases, we have been discussing the influence of television on professional or commercial activities. The aim of these organizations is to make money, and all the management and players can be expected to assume some competitive risk in the business world.

Our problem is different. True, we are interested in dollars, but it is only because they are the only medium by which we can pay for the conducting of athletic and physical training programs so essential in the education of our youth.

Schools have been criticized for being so commerical in their attitudes, but it is a reflex action due to the burden of carrying the budget for the physical side of our kids' training. A great part of our college athletic economics depends on the football attendance and a good many people have lost sight of the fact that in purchasing tickets, they are providing substantial support to the running of all the other sports and athletic facilities at most of our institutions. On the first N.C.A.A. questionnaire we asked the question of what proportion of the athletic budget did football receipts contribute. Not many of the schools answered, but of the ones that did, the per cent ran from around 11 per cent to 158 per cent and the average was about 72 per cent. Where the per cent ran over 100 per cent, it is assumed that football receipts exceeded the budget and were used for other collegiate purposes or placed in reserve for the building of additional athletic facilities.

It is no news to anyone of us that all the schools of this country are faced with a serious financial problem to operate under the rising costs of the present day. If the athletic budget is not balanced, either the program must be cut back or the money be obtained by greater taxes from the people. Maybe the latter is the way our program should be sponsored, but right now football revenue represents a very large pillar in our economic structure, and to have this pillar knocked down or weakened will bring the same sort of chaos and destruction to our physical training as suddenly removing the Federal Reserve Bank from our national economy. No, we are not just interested in the dollars that come in from football, we are morally bound to protect the great and essential role that athletics and physical training must continue to play in bringing up our kids right in this country of ours.

Jerry Jordan, who spoke at this meeting last year, has made a very thorough and interesting study of the effect of television on attendance and we all are very much in his debt for unearthing a vast amount of material and pointing the way

for research on the subject. He has built a case around an hypothesis that attendance only suffers during the novelty period of ownership of a television set, and when this wears off, attendance will be increased. This idea has been pushed and distributed by the Radio and Television Manufacturers Association, and we all will be very happy if this theory turns out to be true.

Other surveys and countless opinions have been rendered on the subject, so that it became quite clear to your committee that it was necessary to investigate and study the problem from a scientific viewpoint, and determine the real facts in the case as soon as practicable. Therefore, with the approval of the N.C.A.A. Executive Committee, we met with the representatives of the four television networks and worked out with them a plan to co-sponsor a survey to be conducted by an impartial professional survey company. The National Opinion Research Center affiliated with the University of Chicago was selected after considering the proposals of several outstanding firms. They studied previous surveys and reports and submitted a preliminary study last summer which was mailed to you, and undoubtedly you are all familiar with it. All N.C.A.A. members were requested to send in their attendance data for 1947, 1948, 1949 and after the season the record of 1950 was requested. A full evaluation cannot be given at this time, but has been promised in March or April. Nevertheless, enough information has been assembled and evaluated to indicate some definite trends, which present the basis for our recommendation.

The information now assembled was distributed to members entering this meeting and has already been covered by Mr. Sheatsley of N.O.R.C.

In addition we have taken some steps to investigate what television is doing to high school football and find a great deal of concern and some reports of damage, but the information is too fragmentary to be conclusive.

Your committee feels that television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system. True, a few schools may profit and grow into greater powers, but the rank and file schools will be reduced and the wide-spread play of football and other sports will be greatly diminished due to decreased budgets. I ask you why this should happen. But I feel that it will happen if we continue to have a few schools telecast and the remainder scramble around for the crumbs that are left. Under the present system of advertisers sponsoring TV games, it is not possible for television to pay the cost of making up to the schools for the necessary money to maintain their programs. They will say "Why should we? We can always buy six or seven schools' TV rights, and that is all we need to make money for us and those six or seven schools." Maybe they can, but if it does happen, we as trustees of a great business of providing essential training for our kids will be derelict in our duties if we allow the hundred million or more of college football receipts to be irreparably reduced, and the great investment of our colleges and high schools in athletic facilities to be jeopardized and not be used fully toward their purpose of building health and virility in this great land.

What should be our course of action? Certainly as representatives of great institutions of learning, we should not be opposed to technological progress, and the increase of enjoyment to the people of this country. We have no quarrel with television, but at the same time, we cannot sit idly by and watch a cornerstone of education eliminated by unwise action. Our dealings with the television officials indicate that they are fine citizens who have no desire to hurt our school system, but are confronted with so many problems in their fast growing and costly industry that they naturally choose the easiest and most profitable course.

Yet we believe that the leaders of the TV industry with their tremendous financial and manufacturing interests have not fully assessed their position, and when they realize that they, like us, have a national responsibility in preserving essential elements of training for our youth, that they will work hand in hand with us to avoid any damage to college football.

In the growth of television so far, many colleges have first allowed their sporting events to be televised free in order to help TV get started. Later the colleges have received small receipts for these events, which in most cases have not been sufficient to offset losses at the gate. Now, the infant television has grown to man size and is at present offering such serious competition to attendance that both the colleges and TV leaders must seek and find a way to preserve football across the country.

Now perhaps the experimentation should be at television's expense rather than at the expense of the athletic programs for our kids. Certainly both sides should push for a satisfactory solution which can benefit all concerned.

There is a reasonable question that the large costs of television production may make it unlikely that the present system of advertising sponsorship will be able to pay for quality programs on television. The television networks lost $24,000,000 in 1949, according to F.C.C. reports, and the costs of establishing a national system of television are staggering, so there is doubt whether the present four billion dollar national advertising budgets can expand to pay these costs.

There are two experimental systems being tested to allow television sets equipped with a decoder to permit a "pay-as-you-see" plan, to pay for quality programs. One is called Phonevision, being currently tested in Chicago. It requires a subscriber to call the telephone company if he desires to see a special program, and part of the television signal is channeled through the telephone wire to unscramble a blurred picture

otherwise seen on the television screen. They are planning to charge $1.00 for each first run movie so seen in Chicago. They plan now to divide this dollar—50 cents for the producer, 25 cents for the television company, and 25 cents for the Bell Telephone Company.

The Skiatron system consists of equipping the television set with a decoding box into which a plastic coded card will fit and will allow the unscrambling of the picture. A new card can be bought at various agencies for a certain interval of time or specific event.

These two methods provide a means by which the viewer can pay for the program seen.

We feel that the colleges should give every encouragement and co-operation to the television industry to develop some such means of paying for the events. It is our belief that the American public will be willing to pay to see their television sporting events especially when they realize that the money goes to support and augment the athletic and physical programs so essential for their sons and daughters. We believe that this income will supplement the actual gate receipts, and may prove beneficial in helping to build better athletic facilities where needed.

A major adjustment would be necessary to administer such a system. It is visualized that the N.C.A.A. and local programming boards would have to work with the television networks and stations. Also a local distribution would be necessary, which might work something like this: Say Notre Dame and Purdue were selected by the N.C.A.A. and Television Planning Board as one of the national games to be live telecast. If the Pittsburgh station telecast it, and a $1.00 Phonevision charge was made on the program and say 100,000 of the 180,000 sets were tuned in, 50 cents would go to the television and phone companies. The 50 cents for the producers could be divided like this:

20%	to the two selected teams or	$ 5,000	for Notre Dame
		$ 5,000	for Purdue
80%	to be distributed to the 17 colleges in the 50 mile area around Pittsburgh.	$40,000	
		$50,000	per game

Of course, if the Notre-Dame-Purdue game were televised in many areas, they will receive ½ cents per set viewing which should insure ample revenue for the chosen contestants. For the local areas, a board of representatives of type schools represented could decide what loss each school had suffered from normal attendance, the enrollment, and the need of the school for athletic facilities.

These formulae are only suggested and would have to be adjusted to give as equitable a solution as possible. The whole idea may sound like a crack-pot arrangement, but the problems of how to divide up some revenue are certainly more soluable than trying to run needed athletic programs without money in the till.

It must be realized that these are two experimental systems which have definite possibilities for the future, but at the present do not offer us any more than a ray of hope.

Another method of televising games which has definite promise is the theatre television. As explained in previous reports, this method was employed experimentally this past fall in Detroit and Chicago by the Paramount Theatres and Big Ten schools. By this means simultaneous TV shows are run through the theatre box office and opportunity given to many potential fans to witness the game at a reduced price. These markets may be rigidly controlled to prevent damage to football attendance revenue and possibly some formula may be established for this means to assist in furthering the schools' athletic systems.

Another mehtod which has had wide use has been the post-game telecasting of films of Saturday's games throughout the following days of the week. Most colleges reported that these showings were well received, stimulated good interest, and aroused some desire in viewers to witness the real games. These programs offer just as good an opportunity to portray the many-sided features of collegiate institutions and create public good will for the school as on the live telecast. Notre Dame has reported a fine reaction to these interesting parts of their programs. The Big Ten employed a post-game plan this fall, and their experience indicates that there was little adverse effect with attendance, and they realized other collateral values. Some revenue can be received, and it can be controlled so that it will not conflict with small college and high school games on Friday night.

It has been the aim of this committee to attempt to collect and present factual information to the N.C.A.A. We acknowledge with thanks the splendid cooperation of the TV industry, and the N.O.R.C., and many other assists from numerous people.

Your committee is perfectly aware of the importance which television has assumed in the American way of life, changing in a short period, the entertainment habits of a large segment of our population. The industry representatives are well aware of this impact, and frankly admit that they have no final answer.

Our study of the past year indicates to us that the live telecasting of college football games has an adverse effect on gate receipts. We believe that the adverse effect is proportionate to the degree of saturation of TV in an area with present methods of telecasting.

The industry representatives with whom we have consulted through the past year have assured us that they have no desire to harm the present structure of intercollegiate athletics. Therefore, we suggest that the N.C.A.A. in cooperation with the

industry set up a program of experimentation during the 1951-'52 academic year, which would include such methods of telecasting as delayed TV, the use of highlights and special features, Phonevision, Skiatron, theatre television, and any other new methods which might be developed before the next football season. During this period of experimentation, we recommend that the colleges declare a moratorium on the live telecasting of college football games.

As part of this experimentation study, we visualize that a certain amount of live telecasting may be conducted on a strict control basis to test desired situations. To administer the experimental work, it is recommended that a steering committee with a representative from each of the eight N.C.A.A. Districts be appointed to work out the problem in cooperation with the industry.

In our opinion if such a program was properly developed and promoted, it would result in mutual benefits for the industry and for the colleges and the public.

We wish to emphasize that the television problem is truly a national one and requires collective action by the colleges. The history on TV has been that concern has only been expressed where some effect has been felt. By next year practically every section will have television so all of us will be involved. Sectional lines cannot be drawn for the co-axial cable will cover the whole country soon. Our decision in solving this problem should be to determine what is good and right for athletics in our schools, and then stand collectively and exert all our efforts to bring about the proper result. We may be likened to the small free nations of the world. By standing together we can fight our cause; separated we will be gobbled up one by one.

We firmly believe that our school athletic programs have contributed a great deal to the qualities that have made this country great. Today as never before, we see the striking need of superb physical fitness in everyone of our young men as they

shoulder the burden of a nation's fighting responsibilities. This is no time for us here to drop our flag and cease fighting for more and better athletic and physical training, or permit the lessening of one bit of our essential program to produce physical fitness in our kids. Rather let the dollars of television and many another less essential activity contribute to assist in the mustering of our best efforts to produce the strongest, fightingest, Americans we have had.

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13. *Report of Television Committee.*

TOM J. HAMILTON (University of Pittsburgh): We had quite a meeting yesterday, where there was a very lively discussion, detailed presentation of information from across the country and from representatives of the television industry, and at which time our committee made up of Ralph Furey, Bill Hunter and myself made a lengthy report.

I do not wish to burden you with the full extent of our remarks of yesterday, but with your permission, I will try to summarize the facts that we found, outline the action we have taken through the past year and give you a resolution which we were directed by the Panel session yesterday to present to this body today.

As you know, our committee was appointed last year after the N.C.A.A. convention, and we were given the job of trying to collect and evaluate facts concerning television and its impact on sports, especially football attendance, and to make recommendations to this body for its action.

First, we attacked the problem and were appalled at the size of it. Certainly television is a most interesting and stimulating subject, and we feel is one of the major scientific developments of our generation and may be a larger motivating force for social and cultural change than possibly the printing press.

We feel some humility in attacking such a vast problem, but in examining the information available, we found that the surveys that we read seemed to be biased or partisan, that the facts presented were mostly opinions and not based on true figures, so we recommended to the Executive Committee of the N.C.A.A. that a survey be conducted by an impartial professional survey company to be co-sponsored by the N.C.A.A. with the television networks, who are equally interested in the problem and who indicated at the time their willingness to cooperate with us.

The survey was authorized. Many of you contributed to its financing. The expense was borne equally by the TV networks and the N.C.A.A. and the National Opinion Research Center was authorized to go ahead.

A preliminary survey was done by that corporation and results sent out this past summer. It was a voluminous report, but in substance it more or less proved the point that there was no real information for decisions in the field of television, and that previous surveys were of no value or limited value.

You were all asked to present your attendance figures for the seasons '47, '48, '49 and '50, which were sent in to the N.O.R.C. and they have made a hurried study of these figures in order to give us some information at this meeting.

The survey is not complete and will not be finished until March or April. There are many factors which must be studied, the effects of weather, performance and many conditions, and we hope that they will give us some excellent information and some trends for the future.

To this meeting they brought some tables of the information they had assembled and that was presented yesterday at the panel meeting by Mr. Sheatsley. I will go over the substance of it roughly.

They established a base for attendance on the 1947-'48 average. The 1949 was the all-time peak in football attendance so that was not used in the base.

Then they took the results of '49 and '50 and compared them with the base figures and did it by districts so that their findings were that for all the colleges in 1950. In all of the colleges the attendance was down in TV areas 4.2 per cent from the base figure or 6 per cent from the 1949, and the colleges outside of TV areas in 1950 were up 9.3 per cent from the base figure or an increase of 2.5 per cent from 1949.

These figures are available on the piano back of the press tables for those who did not get copies yesterday.

There is another table of attendance in relation to team performance which gives a very interesting highlight. In TV areas the decline in relation to performance is much more remarked than outside of TV areas.

Table three, attendance in relation to the number of TV sets in an area. We find that from the 1947-'48 average, the saturation of TV sets in those areas with 50 to 59 per cent saturation, decline 18.3 per cent from the base figures; 40 to 49 per cent saturation, a decline of 4.2 per cent, and where we have only one in 20 per cent saturation, there is an over-all increase of 11.1 per cent in attendance.

To sum up, in areas with 30 per cent or more families owning television sets, the decline from the base years was 10 per cent and all other areas showed a plus 10 per cent. These figures, we feel, will have definite value, and we have drawn some conclusions from them.

We made a point that we feel that the economic structure of college athletics and physical training programs depend a greal deal on football receipts. The information is not completely accurate, but an average of 71 or 72 per cent of the normal athletic budget of most colleges reporting came from football receipts.

We feel that with the drop of attendance all of us are faced with a decline in revenue. There are only two alternatives to that—curtailment of program or an increase in taxes to raise revenue to finance athletics.

We brought out that other entertainment industries such as the movies, baseball, major and minor league attendance have been affected by television. The relationship is not too clear to us, but we felt it was significant.

Next, we felt that this is a collective problem. As television has swept from one area into another, and with the networks extending throughout all areas and able to carry games from one section to another, we feel that the problem is truly national and needs collective action.

With that in mind, after hearing some very good discussion from the industry representatives who were kind enough to come to Dallas to make these presentations and who I might add have shown the greatest of cooperation and amicable understanding with us in attacking this problem, the meeting yesterday authorized a resolution to be presented to this body, and I would like to present it to you now:

"Whereas, there is positive evidence that live television broadcasts have an adverse effect on attendance at college football games, and

"Whereas, the future growth and further expansion of the television industry indicate that this adverse effect on attendance will become increasingly great, and

"Whereas, television has spread across sectional lines and involves colleges in all parts of the country necessitating collective action and agreement, and

"Whereas, loss of football gate receipts from drop in attendance threatens the economic structure of college athletics and the necessary support for essential physical training programs;

"It is resolved that the members of the N.C.A.A. agree to declare a moratorium on live telecasting of college football games for 1951, and

"It is further resolved that members will cooperate with the N.C.A.A. and the television industry to experiment with all types of television broadcasting to include such methods as delayed showing of films, use of highlights and special features, Phonevision, Skiatron, theatre television, special controlled live telecasts, and any other methods which may be developed.

"It is further recommended that a committee consisting of one member from each N.C.A.A. District be appointed by the Executive Committee to work on and direct this project of the N.C.A.A."

I move that this resolution be adopted. (The motion was duly seconded.)

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PRESIDENT WILLETT: Is there further discussion?

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The motion is carried and for the record the vote is 161 in favor of the motion, seven opposed.

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DEFENDANT'S EXHIBIT B-2

* * *

MR. RALPH FUREY: A year ago, in Dallas, on the basis of a report jointly sponsored, jointly paid for, by the N.C.A.A. and the four major networks N.C.A.A. took certain action in regard to television. As a result of that action a TV Committee, the N.C.A.A. — TV Committee, was appointed. As we were directed, we have diligently studied the problem from all possible sources, all available types of information and on the basis of this study of this past year, on the basis of so-called experimental' program of this past year, on the basis of the preliminary findings as supplied by the N.O.R.C. and which were available to the TV Committee before the final draft of this report, we do have and do submit at this meeting to the membership the results of our one year study.

I.

HISTORY OF THE N.C.A.A. TELEVISION PLAN

The concern of the colleges of the country with the effects of television upon football attendance and thus upon the future of intercollegiate and intramural athletic and physical training programs became more and more evident as television sets began to saturate important collegiate areas. More than two years ago, various Conferences publicly expressed their deep concern at the serious impact of live telecasting on attendance at college football games. One important Conference, the Big Ten, went so far as to ban live television during the 1950 season and other Conferences have followed suit. It was soon realized, however, that this new medium presented problems that could not be solved by sectional groups. Of what avail the banning or limiting of television by a single conference if major teams were competing at the Stadium? And so, the problem of televising college football games confronted our National body.

The N.C.A.A. accepted the responsibility for meeting this new threat to intercollegiate and intramural athletic and physical training programs. The N.C.A.A. early in 1950, appointed a three man television committee, consisting of Thomas J. Hamilton of Pittsburgh, Willis O. Hunter of Southern California, and Ralph Furey of Columbia, with instructions to make a thorough investigation and to report its findings to the membership at the Dallas Convention in January, 1951.

The Committee was struck at once with the prevalence of opinion on the subject and the absence of factual information. Accordingly, the Committee met with Joseph McConnell, President of the National Broadcasting Company, representing the four major networks, and arrangements were made for a joint N.C.A.A.-network study of the impact of television on attendance at college football games. It was agreed by the representatives of the networks and the N.C.A.A. Committee that a statistical study should be made covering the 1947-1950 football seasons; the services of the National Opinion Research Center were retained for the purpose of making this study. The preliminary report of the National Opinion Research Center was made available to the Dallas Convention and demonstrated the devastating effect of uncontrolled live television upon attendance at college football games. The Committee recommended drastic action to save the athletic and physical training programs of the two million young college students, programs vital to the defense of the Nation.

Action at the Dallas Convention

The Dallas Convention backed the report of the Hamilton-Hunter-Furey Committee and, by a vote of 161 to 7, adopted the following resolution:

> "It is resolved that the members of the N.C.A.A. agree to declare a moratorium on live telecasting of college football games for 1951, and

"It is further resolved that members will cooperate with the N.C.A.A. and the television industry to experiment with all types of television broadcasting to include such methods as delayed showing of films, use of highlights and special features, Phonevision, Skiatron, theatre television, special controlled live telecasts, and any other methods which may be developed.

"It is further recommended that a committee consisting of one member of each N.C.A.A. District be appointed by the Executive Committee to work on and direct this project of the N.C.A.A."

A nine-man Committee was appointed to implement the experimental program contained in this resolution. The members of the Committee follow:

District 1: Robert A. Hall of Yale.
District 2: Ralph Furey of Columbia.
District 3: Max Farrington of George Washington.
District 4: Edward Krause of Notre Dame.
District 5: Reaves E. Peters of Missouri Valley I.A.A.
District 6: Howard Grubbs of Southwest Athletic Conference.
District 7: E. L. Romney of Mountain States Athletic Conference.
District 8: Willis O. Hunter of Southern California.
Captain T. J. Hamilton of Pittsburgh, Chairman

In view of the difficulty of the N.C.A.A. Television Committee meeting regularly, the Eastern members (Hamilton, Hall, Furey and Farrington) were appointed a Steering Committee to act between meetings of the full Committee. Subsequently, when Chairman Hamilton's coaching duties at Pittsburgh demanded his full time, Ralph Furey became Co-Chairman of the full Committee and the Steering Committee along with Hamilton.

The Development of the N.C.A.A. Plan

The Committee was immediately faced with two major problems in its efforts properly to implement the Dallas resolution. The first was the necessity for spelling out a workable program for the 1951 season and the second was to find a sponsor for the program once adopted.

The first and most immediate task, of course, was the development of a workable and concrete plan for the 1951 season. The full Committee and the Steering Committee met frequently during the months following the Dallas Convention. In its efforts to find the best solution, the Committee consulted with all interested parties and with recognized experts in the field. Finally, on April 18, 1951, the full Committee, meeting in Washington, adopted by unanimous vote a detailed N.C.A.A. Television Plan for 1951.

The broad outlines of the Plan were:

1. One game a week would generally be broadcast on Saturday afternoons in each area during the regular season from September 22 to November 24.
2. On 3 of the 10 Saturdays during the regular season there would be a blackout in each area.
3. A team could only be telecast twice—once at home and once away.
4. There would be no restrictions whatever except on Saturday afternoons during the regular season.
5. The games to be telecast would be chosen by the sponsor, subject to the requirements that different types of games (Local games, sectional games, national games, etc.) be offered on different Saturdays.
6. A systematic study of the effects of this program on attendance at college football games would be made by the National Opinion Research Center.

7. The proceeds from the sale of television rights would be divided as follows: 40% to the contestant colleges and 60% to the N.C.A.A. for research and to promote the athletic interest of colleges throughout the nation.

8. Maximum encouragement would be given to theatre television, color television, Phonevision, Skiatron, post-game films and any other new methods under development.

As already stated, the Committee acted unanimously in adopting its plan and collegiate support was almost equally unanimous. Indeed, such opposition as there was to the plan came primarily from colleges taking the view that the program provided too great a measure of live television which would be detrimental to attendance.

Only two institutions—Pennsylvania and Notre Dame—raised any question in the other direction. Notre Dame took the position that the 60-40 division of television revenues was not authorized by the Constitution of the N.C.A.A. and also urged that the individual colleges be permitted to make their own arrangements for telecasting within the approved program. There was also some feeling among other institutions that the 60-40 division of revenues ought not be undertaken without additional authority from the National body. Consequently, at the meeting of the full TV Committee on July 6th, this part of the plan was amended to provide that the expenses of the N.C.A.A. television program be met by an assessment on the colleges whose games were being televised rather than by a 60-40 division of the proceeds. In addition, the plan was modified to provide that the chosen sponsor would negotiate all contracts directly with the institutions whose games were to be televised. With these changes, Notre Dame loyally supported the Committee plan.

The only institution which challenged the plan directly was Pennsylvania. On June 6th, Pennsylvania announced that it

would not abide by the N.C.A.A. Television Plan, but on the contrary, would telecast all its home games. The Council of the N.C.A.A. promptly declared Pennsylvania a member in bad standing. Immediately thereafter, four institutions scheduled to play Pennsylvania at Philadelphia, namely, Cornell, Columbia, Dartmouth and Princeton, notified Pennsylvania that they were not willing to compete against a member in bad standing and refused to sign football contracts for the 1951 season. Pennsylvania appealed to the Department of Justice for assistance, but, receiving none, reconsidered its decision and decided to abide by the Dallas resolution.

The Committee cannot leave this part of its report without expressing its gratitude to the N.C.A.A. membership as a whole for its loyal support of the Dallas resolution and of the Committee plan implementing that resolution and without expressing its particular gratitude to the four institutions that risked serious financial losses rather than compete against an institution in bad standing which was threatening the welfare of 300 colleges. This rallying-round behind the N.C.A.A. Television Plan for 1951 heralds, we believe, a new era in cooperation among the colleges of the country in the interest of intercollegiate athletics.

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II.

OPERATION OF THE N.C.A.A. TELEVISION PLAN FOR 1951

Introduction

The operation of the N.C.A.A. experimental television program for 1951 was an outstanding success. Millions of people saw fine college football games on their television sets week after week. A great number of colleges had the advantage of participating in the fine public relations program which

the Westinghouse Electric Corporation provided as part of its telecasts. At the same time, a thorough study of the effects of television upon attendance at college football games was made possible and, finally, the adverse effect of television upon college football was substantially reduced.

The success of the program has already been attested by the colleges themselves. On December 6th, the Executive Director of the N.C.A.A. addressed a questionnaire to all the allied Conferences of th N.C.A.A. on the televising of college football games. Ten major Conferences, representing over 100 institutions, met during December. All but three of these more than 100 institutions stated that they believed live television of college football games should be controlled in 1952. While the predominant view favored approximately the same degree of control as during the 1951 season, there was far more sentiment for more limited television than for a more extended program.

Broad Scope of the Program

The experimental TV program consisted of 20 games featuring 30 college teams over the NBC network of 52 TV stations in markets representing an aggregate population of 87 million people. Although Westinghouse chose NBC as its telecasting network, the games were also available to all other networks and independent stations on a sustaining basis and Station WOR-TV in New York carried the N.C.A.A. games on that basis. The NBC Research Department estimates that 35 million people saw at least some of the N.C.A.A. experimental program.

The Notre Dame-SMU game, for example, reached into 3,130,000 homes, the total viewers being estimated at 7,199,000. This was considerably over half of the total potential audience in the 39 areas where that game was shown. A number of games were also telecast in non-network areas, but their audience was naturally more limited.

As indicated above, the N.C.A.A. television program made possible the participation of 30 college teams in network telecasting. These colleges were thus afforded both the possibility of obtaining a share of the telecasting revenues and a fine public relations program undertaken by the sponsor. The Committee believes that the participation of so broad a group in the program is a healthy alternative to monopolization by a few top teams which would otherwise take place.

The wider the spread of television among the colleges, the less its effect in the field of overcommercialization of athletics. If two or three teams dominate the entire television network field, the financial rewards will be so great as to put irresistible premiums on successful teams. There will soon be many times more television stations than there are today and severalfold more television sets. The dangers to college football through competition for the sale of television rights will be greater than any temptations yet known to the game. If a Bowl game with its relatively modest $100,000 "take" has become a serious enough problem for N.C.A.A. consideration, how much more concerned must our members be in regard to a TV situation under which a half dozen teams could control the interconnected network with as much as half million dollars being dangled before the top two or three. It is only through a controlled program involving not thirty top teams but fifty or more teams of all types fairly selected, that this greatest threat to the integrity of the game can be met.

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III.

LEGALITY OF CONTROLLED TELEVISION

At the very outset of the Committee's work, the charge was made by various groups opposed to the action of the Dallas Convention, and the Committee Plan implementing that action, that any form of controlled television was a violation of the

Federal Anti-Trust Laws. The Committee, including Robert A. Hall of Yale, himself an experienced attorney, was confident that the Committee Plan was not a violation of any law. However, the Committee deemed it advisable to obtain the best possible legal advice on a matter of this importance, and Joseph L. Rauh, Jr., a prominent Washington attorney with fine legal experience in and out of government service, was retained by the N.C.A.A. as legal counsel for the Committee.

After reviewing the matter thoroughly, Mr. Rauh advised the Committee that, in his opinion, reasonable controls on telecasting would not violate the anti-trust laws and that the controls proposed by the Committee were reasonable in law as well as in fact. Mr. Rauh consulted other well-qualified attorneys and law teachers who supported his view of the matter.

Mr. Rauh prepared a detailed legal brief demonstrating that the N.C.A.A. Television Plan for 1951 did not violate the anti-trust laws. The brief pointed out that the restrictions on the broadcasting and telecasting of baseball games, which the Department of Justice had itself officially approved in October, 1949, were far greater than the restrictions contained in the N.C.A.A. Plan for the telecasting of college football games during 1951. All apart from the Department of Justice's 1949 ruling in the baseball situation, the brief pointed out that the N.C.A.A. Plan was a reasonable proposal for dealing with a nationwide threat to intercollegiate and intramural athletic and physical training programs essential to our defense and thus valid as a matter of law.

The N.C.A.A. Television Plan for 1951 was presented to the Department of Justice the day after its adoption together with Mr. Rauh's brief in support of the legality of the Plan. This conference on April 19, 1951 was attended by Assistant Attorney General Morison and his staff and by representatives of the N.C.A.A.-TV Committee. At the conclusion of the conference, the representatives of the Department of Justice

stated that they would take the matter "under study" and the representatives of the N.C.A.A. stated that they would keep the Department fully informed as to all action taken. The Committee has conscientiously carried out its undertaking with respect to furnishing full information to the Department.

When the Westinghouse Electric Corporation became the sponsor of the N.C.A.A. television program in July, 1951, their attorney also discussed the legal issues with the Department of Justice. At that time, the Westinghouse attorney was informed that the Department had not taken any official position on the N.C.A.A. program.

On October 9, 1951, the Department of Justice brought a civil suit against the National Football League seeking to enjoin the League from continuing its controlled television program. The Department announced that it was using its suit against professional football as a "test" case and indicated that no action would be taken against other sports until a definitive ruling was obtained in that case. The case has not yet been set for trial and no final court decision can be expected before a year or two. Furthermore, although a final decision favorable to the National Football League would settle the matter favorably to the N.C.A.A., an adverse decision in that case would not be determinative of the legal issue in the college situation. The restrictions imposed by professional football on both broadcasting and television are much greater than those imposed on telecasting by the 1951 Plan or are likely to be imposed by any future plan. Furthermore, the purpose of the N.C.A.A. Plan—the protection of the athletic and physical training programs of both colleges and high schools—differentiates the college situation from that of the professional football league.

Just prior to the Kentucky-Tennessee game of November 24th, a great deal of pressure was put on the Department of Justice to force the N.C.A.A. to allow the telecast of that game. At that time, a report emanating from the Justice Department

erroneously indicated to the public that the Department had previously informed the N.C.A.A. that its plan was unlawful. At no time prior to the Kentucky-Tennessee game dispute had the Department of Justice informed the N.C.A.A. in public or in private that its plan was unlawful, and any statement to the contrary was and is unfounded.

The N.C.A.A. should continue to keep the Department of Justice fully informed of its action and to watch the course of the pending action against professional football with interest. The Committee states, however, upon advice of counsel, that it believes its 1951 Plan and any similar plan was and is completely lawful. We believe that the ruling which the Department of Justice issued in October, 1949, in connection with the broadcasting and telecasting of baseball games was correct and completely validates a reasonable controlled program. All apart from the baseball ruling, we believe that the colleges have the right to come together through an organization of their choosing to deal with fundamental problems affecting intercollegiate athletics. If television, or anything else, threatens the future of intercollegiate athletics, we do not believe the law prohibits reasonable efforts to meet the threat.

Two examples may help to illustrate this undeniable right of the colleges to come together to protect the strength and integrity of athletics. Suppose the N.C.A.A. should at some time decide to ban or limit Bowl games on the theory that such games result in over-emphasis on the importance of winning and thus hurt college football. Is the N.C.A.A. going to be told by the Department of Justice or anyone else that its efforts to deal with a serious problem like this is an illegal or unreasonable restraint of trade and that the colleges cannot get together through the N.C.A.A. and agree to ban or limit Bowl games? Certainly no one would go that far, and yet, the "restraint" on the sponsors of a Bowl would be little different from the N.C.A.A. "restraint" on television. Again, suppose the N.C.A.A. should at some time ban basketball games in public

arenas on the theory that such games provide too great a temptation for the players. This, too is a "restraint" on the public arenas' right to deal with the individual colleges, but we do not believe anyone would seriously contend that such action by the N.C.A.A. would be illegal. N.C.A.A. action in the field of television, if undertaken for a similar purpose, could hardly be deemed invalid. Indeed, as we have already pointed out, the dangers inherent in television networks paying a half million dollars to a single institution for football television rights far outshadows the dangers from these sources.

In the last analysis, the question comes down to this: Is any given plan for dealing with television a reasonable one? If the plan adopted by the N.C.A.A. for the future is in fact a reasonable one, we believe it will also be a legal one. We believe that if the colleges determine that television is threatening the game of football, they are not without legal right to take reasonable action through the N.C.A.A. to protect the game.

IV.

STUDY BY NATIONAL OPINION RESEARCH CENTER

As part of the N.C.A.A. Television Plan for 1951, the N.C.A.A. made $50,000 available to the National Opinion Research Center for a systematic analysis of the effects of the experimental program on 1951 football attendance. The N.O.R.C. 1951 research program represents the most detailed and scientific study ever made of the attitudes and behavior of football fans in all parts of the United States. The scope of the program far surpassed last year's collection of attendance data; and the final N.O.R.C. report this March, in addition to evaluating the effectiveness of the experimental TV plan, will also contain much previously unknown information concerning the nature and habits of the people who buy admission to the country's college football stadiums.

In total, more than 100,000 individuals were contacted in the course of the 1951 research program. Two national cross-section surveys were made, one around Labor Day before the season started, and the second around Thanksgiving at the close of the season. The metropolitan areas of Boston and Pittsburgh were selected for detailed study, and a representative cross-section of approximately 500 football fans in each of these two cities was interviewed personally every week of the season regarding their Saturday afternoon and weekend activities. Seventeen colleges from New York to California cooperated with the N.O.R.C in conducting questionnaire surveys of their stadium audiences on two or more Saturdays during the season. Seven colleges participated in the research through their conduct of the telephone surveys among a cross-section of football fans in their home localities on those Saturdays when a home game was being played. Seven colleges, in collaboration with N.O.R.C. research experts, carried out mail questionnaire surveys of their alumni and students. Game-by-game attendance reports were solicited each week from the 269 football playing member institutions of the N.C.A.A. Finally, seasonal attendance data from 1947 to date were requested from a cross section of 250 high schools all over the country, in order to get some indication of TV's effects on this type of football attendance. All of this data will be analyzed in the final report of the N.O.R.C., which will be available this March.

Although the overwhelming mass of material collected by the N.O.R.C. this Fall has not yet been thoroughly analyzed in the short time since the close of the season, the overall trend of the research findings is unmistakably clear. We now know, for example, that the N.C.A.A.'s experimental program of restricted telecasting during 1951 did slow up the alarming decline in attendance which was characteristic of the great majority of colleges who were faced with unrestricted TV competition during 1950. Attendance in television areas was again down during the most recent season, but the colleges subject to

restricted television competition in 1951 suffered relatively less than they did in 1950 from unrestricted television. The N.O.R.C attributes this relative improvement to the N.C.A.A.'s experimental plan.

A few figures will illustrate the basis for this conclusion. Overall attendance during 1950 was substantially the same as overall attendance during the "Normal" or "base period," the 1947 and 1948 pretelevision seasons. Overall attendance during 1951 was down about 6% from both base period attendance and 1950 attendance. This overall drop was due to the decline in student enrollment of over 10% and the general sports attendance fall-off.

The fact that is significant here is that the colleges in areas where games were available on television, suffered relatively less from television competition under the 1951 Plan than they did in 1950 with unrestricted live television. The colleges in TV areas drew 96% of their 1950 attendance, a loss of only 4 points. Among colleges which faced no TV competition at all, attendance, while remaining better than that of colleges in TV areas, was only 90% of 1950, a loss of 10 points. Compared with last year, therefore, the adverse effects of television were greatly reduced.

We can also put this same point another way. In 1950, when television competition was generally unrestricted, attendance in TV areas was off 7.2% from base-period attendance, while attendance in non-TV areas was up 13.8% over base-period attendance. This differential of 21 points represents the effect of television in 1950. In 1951, however, attendance in television areas under the restricted N.C.A.A. Plan was off only 11.1% from the base period and non-TV area attendance was up only 2.3% over base-period attendance. In other words, the television differential was cut from 21 points to 13.4 points in 1951 by the N.C.A.A. Plan, which substantially eased the pressures of television competition. Considering the great increase in the number of TV sets in operation during 1951, it is

all the more significant that the N.C.A.A. program of restricted telecasting so noticeably reduced the adverse effects on attendance.

We also know from the research results available today that the television problem is still very much with us. Although more attractive games—those between old rivals with good win-loss records—consistently drew larger crowds than less attractive games, the colleges which are faced with television competition still show lower attendance levels than do those without TV competition. Although the "TV differential" was cut over a third, from 21 points to 13.4 points, the differential still remains and represents a very substantial loss to the colleges resulting from television. The attendance of colleges outside the range of TV is still slightly (2.3%) above the 1947-48 base levels, but when television is present, attendance is still off over 11% from the 1947-48 levels. The 1951 N.C.A.A. plan slowed up the rate of loss for this latter group and eased their position to a substantial extent, but they still had television competition and it still hurt them significantly.

Preliminary tables prepared by the N.O.R.C. setting forth 1951 attendance results district by district are appended to this report.

The N.O.R.C. found some indications that attendance on blackout Saturdays was a little higher than when a telecast game was available. They were unable to find these differences consistently enough or to a large enough degree to prove the matter mathematically. This was also true in the comparison of attendance during telecasts of regional against non-regional games. The Committee believes these inconclusive results stem largely from the fact that the public in general was not well informed about the N.C.A.A. experimental plan and was not generally aware of the blackout dates or the dates for non-regional telecasts in sufficient time to make plans for attendance at a local game. As the final report of the N.O.R.C. will make clear, most decisions to attend football games are made consid-

erably in advance and relatively few are made at the last minute. It seems probably that most fans made their decisions to attend or not to attend weeks before they learned about a scheduled blackout or a scheduled non-regional game and when this knowledge came to them it was usually too late to alter their decision about attendance. This conclusion is supported by the cases referred to in the following sections where publicity given to a blackout or to proposed television definitely affected game attendance. The Committee strongly recommends that the earliest, widest, and most detailed publicity be given to next year's television program so that timely plans can be made for attendance.

Research cannot decide all our problems for us. It can only provide a factual basis on which we must make our own decisions. We now have a sound basis of facts about football attendance, built up by the N.O.R.C. over the past two seasons. We will have an even sounder basis when the final N.O.R.C. report is available later this year. We urge that, no matter what our decision about television during 1952 may be, the N.C.A.A. continue to collect the factual information which will enable it to judge our progress and to continue to plan soundly for the future.

V.

INDIVIDUAL INSTANCES OF THE EFFECTS OF TELEVISION UPON ATTENDANCE

The preliminary figures supplied by the N.O.R.C. demonstrate the continued serious adverse effects of television upon attendance at college games. While no further demonstration is required, the Committee believes that the membership would be interested in a few individual instances of these serious adverse effects which have come to its attention and which are no doubt typical of dozens of similar instances throughout the country.

When it was announced that the blackout of Washington, D.C., scheduled for November 10, was to be shifted to November 17, sales of tickets for the Maryland-North Carolina State game on the latter date accelerated to a point three times the normal rate of sales for the season. The November 17 blackout in Washington received widespread publicity because of the controversy which resulted in the blackout of November 10 (the day of the Notre Dame-Michigan State telecast) being shifted to November 17. This instance is significant because it illustrates that when the existence of a blackout is known to the public early enough, there is a definite favorable effect on sales. Vice versa, when the University of Southern California and Stanford were seeking permission to telecast their game at Los Angeles on November 10, ticket sales dropped immediately upon publication of the report of the telecast. In like vein, when it became known generally that the Michigan-Ohio State game was to be telecast, there was a deluge of requests for refunds or cancellations. So, too, when it became known that the Colorado-Nebraska game of November 17 was to be telecast, requests for refunds mounted and even entire train parties were cancelled to watch the game by television instead of actual attendance. Even in the case of the famed Army-Navy game, prospective spectators came trooping into the ticket offices, only to say that they would watch the game on television if the end zone was all that was available. This preference of television over all but the best seats has become too commonplace for the Committee to multiply examples.

The Mid-American Conference provided a startling example of the adverse effect of television on attendance. The Miami-Cincinnati game was played this year on the same day that the Michigan-Ohio State game was telecast in Cincinnati and the surrounding territory. This game decided the football championship of the Mid-American Conference. Weather conditions were very good; the rivalry is over fifty years old; both schools had fine records. Usually the Cincinnati-Miami game is a sellout of 30,000. This year attendance was 16,000.

District 2, the Middle Atlantic States, the area of highest set saturation in the United States, provided an equally significant example of the adverse effect of television upon attendance. While attendance in District 2 was definitely off during the 1951 season, the two major institutions in this area not on the interconnected network, namely, Cornell and Penn State, did exceedingly well in their home stadiums. The significant fact is that only when they visited TV areas did their attendance fall off. Thus, for example, Cornell's home attendance increased nearly 25% in 1951, while its away games were off almost 10%.

Space does not permit the multiplication of examples from the experience of college football or from other sports.

VI.

CONCLUSION AND RECOMMENDATIONS

The Committee does not feel that it can conclude its report without a word on the importance to the American way of life of college football and the athletic and physical training programs which depend on it. For, in the last analysis, that is the focal point at which our efforts have and must continue to be directed.

We are united in our belief that football is a game that has and does contribute to the strength of our great nation. The necessities of our country constantly demand larger and larger numbers of our finest citizens to direct and fight for her welfare and for the furtherance of Christian ideals throughout the world. Football is the stiff backbone of our giant sport system that indoctrinates the young men in our high schools and our colleges to carry on the great American spirit of hustle, free and fair competition, resourcefulness, and the will to win. Football is the stern master which demands the best and enlarges the physical, mental and moral capacities of its players. Football is the standard-bearer and the provider for all the other school

sports and for our vast intramural games and physical training programs; it provides three-fourths of the athletic budgets of the colleges of the nation.

Our nation has grown with amazing speed and progress due to the ambition, initiative, teamwork, and drive of its hard-working and enterprising manpower. Where else in our training pattern can these characteristic qualities be developed as well? Should we, who know these truths, stand idly by and allow the nucleus, football, and the whole sport system be threatened or impaired by a development, television, which trends in the opposite direction of more softness and commercialization and lessened participation? Do the engineers believe that mathematics should be dropped or reduced because mechanical computers have been invented? We note with regret that many schools and colleges have had to drop football when there are many present who could testify to the great good accomplished by the addition of 150-lb. football to their programs. The need is for more football and more sports instead of less.

Intercollegiate and interscholastic athletics are the spearhead of our national training program. The strength of the competition kindles the ambition of youths to excel, to work and perfect themselves to deliver their best efforts. Teamwork, self-sacrifice and perseverance are required; strength, stamina, courage and skill are demanded. They supply incentive and opportunity which gives the impetus for individual, intramural and lesser squad participation. They reflect the leadership of football, and depend on its receipts for their own existence.

Many say that all this great sports activity should not depend on football receipts. But have those who take this view agreed to provide from taxes or any other source the necessary funds to underwrite this vast athletic program? Until they do, our present method must pay the bills. No one objects to the fact that Community Chest or Red Cross budgets are higher than they used to be, because it is known that the amount of

good they do is great. Yet there seem to be many objectors to the effort of athletic administrators to defend the income that supports a very vital part of the Nation's training program, a program dedicated to building strength, health, courage, ability and self-reliance. Perhaps we have in the past oversold the spectacular parts of our events. For the future we are determined not to leave unnoticed the great service performed by football, which takes all the kicks and criticism, yet still supports sports opportunities of all kinds for our rising generations.

In conclusion, the Committee desires to stress again the dangers to the game of football if two or three top teams are able to monopolize the television networks. The resulting financial rewards would create greater temptations than any yet known to the game and would place irresistible premiums on successful teams. We must not only limit the amount of television, but we must spread it far and wide.

We believe that the experience with the N.C.A.A. Television Plan for 1951 and the facts set forth in this report make clear the course of the N.C.A.A. for the future. We reject the urgings of those who seek a complete ban on live telecasting; college football and live television can and will live side by side. Equally firmly, we reject the urgings of those few who would return college football to unrestricted live television and seek thereby to profit from the loss of others and particularly from the loss of the small colleges and high schools. We urge a middle course of moderation. To this end, we recommend to the N.C.A.A. convention the following plan for 1952:

1. A television program for the 1952 season controlled and directed by the N.C.A.A.

2. The objectives of this program shall be:

   (a) To minimize the adverse effects of live television upon attendance at college and high school football games;

(b) Within the limits of such control plan as may ultimately be adopted, to spread television among as many colleges as possible;

(c) To provide television to the public to the extent consistent with the first two objectives.

3. The 1952 television program shall be worked out by a TV Committee to be appointed by the Council of the N.C.A.A.

4. The Committee shall give full consideration to the final N.O.R.C. report when available.

5. When the plan has been worked out by the Committee, it shall be submitted to the membership, of the N.C.A.A. for adoption by mail referendum vote.

6. No member of the N.C.A.A. shall make any contracts or arrangements for the televising of games for the 1952 season except in accordance with the approved plan.

We believe that an effective plan for 1952 can and will be worked out by the new Committee. We further believe that, as we have already stated, the sports public will come to understand the great issues at stake and will recognize the N.C.A.A. efforts in this field as the best and only means of protecting the physical well-being and the physical development of the sons and daughters of the nation.

Respectfully submitted,

Robert A. Ha[illegible]	E. L. Romney
Max Farrington	Willis O. Hunter
Edward Krause	Ralph Furey, Co-Chairman
Reaves E. Peters	Thomas J. Hamilton,
Howard Grubbs	Co-Chairman

TABLE I

TRENDS IN PAID FOOTBALL ATTENDANCE IN 1950 AND 1951 FOR COLLEGES WITH TELEVISION COMPETITION AND WITH NO TELEVISION COMPETITION

Percent of Expected Attendance*

	**1950	1951	1951 as Percent of 1950
Colleges with TV competition (141)	92.8	88.9	96%
Colleges with no TV competition (95)	113.8	102.3	90%
All Colleges (236)	99.5	93.4	94%

* "Expected" attendance is average for the two pre-television base years, 1947-48.

** 1950 figures differ slightly from those reported last year, due to some shifts in classification add to adjustment for free admissions.

TABLE II

1950 AND 1951 ATTENDANCE TRENDS EXPRESSED IN TERMS OF PERCENT OF COLLEGES INCREASING AND DECREASING THEIR ATTENDANCE

Percent Whose Attendance Was:	1950 (compared with 1947-48) Colleges Where There Was		1951 (compared with 1950) Colleges Where There Was	
	TV	No TV	TV	No TV
Up	31%	48%	31%	23%
Same	26%	14%	18%	9%
Down	43%	38%	51%	68%
	100%	100%	100%	100%

TABLE III

TRENDS IN PAID FOOTBALL ATTENDANCE IN 1950 AND 1951 FOR COLLEGES WITH TELEVISION COMPETITION AND WITH NO TELEVISION COMPETITION BY N.C.A.A. DISTRICT

Percent of Expected Attendance

N.C.A.A. District	No. of Colleges*	1950	1951	1951 as a Percent of 1950
1—New England				
TV Competition	(18)	80.2	72.5	90%
No TV Competition	(6)	100.2	69.0	69%
Total	(24)	81.8	72.2	88%
2—Middle Atlantic				
TV Competition	(43)	83.2	74.3	89%
No TV Competition	(6)	103.4	83.8	81%
Total	(49)	83.6	74.5	89%
3—Southeast				
TV Competition	(20)	99.1	93.5	94%
No TV Competition	(17)	103.9	95.7	92%
Total	(37)	101.4	94.4	93%
4—Midwest				
TV Competition	(39)	101.2	99.6	98%
No TV Competition	(13)	99.6	97.6	98%
Total	(52)	100.9	99.3	98%
5—West Central				
TV Competition	(8)	96.7	98.9	102%
No TV Competition	(16)	128.0	103.6	81%
Total	(24)	113.0	101.5	90%
6—Southwest				
TV Competition	(0)	—	—	—%
No TV Competition	(19)	127.3	124.4	98%
Total	(19)	127.3	124.4	98%
7—Mountain				
TV Competition	(2)	81.8	58.5	72%
No TV Competition	(7)	91.5	51.6	56%
Total	(9)	88.4	53.6	61%
8—Pacific				
TV Competition	(11)	91.0	92.3	101%
No TV Competition	(11)	114.1	102.5	90%
Total	(22)	96.9	95.1	98%

* Percentage changes should be interpreted with caution when only a small number of colleges are included.

TABLE IV

AVERAGE PAID ATTENDANCE AT MORE AND LESS ATTRACTIVE GAMES IN 1951, AS A PERCENT OF EXPECTED ATTENDANCE* FOR LARGE, MEDIUM AND SMALL COLLEGES WITH AND WITHOUT TELEVISION COMPETITION

MORE ATTRACTIVE GAMES**

Size of College***	Colleges with TV Competition	Colleges with No TV Competition
Large	111%	136%
Medium	105%	139%
Small	100%	119%

LESS ATTRACTIVE GAMES

Size of College	Colleges with TV Competition	Colleges with No TV Competition
Large	70%	85%
Medium	65%	76%
Small	62%	72%

* "Expected attendance" is average attendance per game in the two pre-television base years, 1947-48.

** "Game Attractiveness" was determined by rating of the athletic director at each college, without regard to weather or television competition.

*** "Large" colleges are those which averaged 15,000 or more attendance during the base years; "medium" colleges are those which averaged 5,000 to 14,999; "small" colleges are those which averaged less than 5,000 per game during 1947-48.

CHAIRMAN WILSON: You have heard the report and the Chair will be glad to recognize delegates who wish to discuss it.

MR. FRANCIS MURRAY (University of Pennsylvania): Could he give us some enlightenment on the charts at the end of the report, the four statistical tables at the end of the report?

CHAIRMAN WILSON: Mr. Sheatsley is here and I believe would be glad to answer any questions.

MR. SHEATSLEY: I will be glad to answer any questions about the Table or would you prefer I run through them briefly? Did you have anything specific in mind Mr. Murray?

MR. MURRAY: I think it would be helpful if you run through them briefly.

MR. SHEATSLEY: Table I provides the answers to two questions, first, does television affect football attendance and second, was the N.C.A.A. 1951 plan successful in reducing that adverse effect.

We get the answer from the second column under 1951. We see for instance on the second line that colleges which had no television competition in 1951 drew 102.3 per cent of their average 1947-48 base attendance. In other words, their attendance has held up. It is even a little better than it was in those base years.

Colleges with television competition, however, in the line above drew only 88.9 per cent of their base attendance.

The differential there is something like 13.4 points which can be attributed to the effects of television.

Now, the final column there which shows 1951 as a per cent of 1950 indicates that the N.C.A.A. 1951 plan helped to reduce the adverse effects of television. We see football attendance in general was off last year for all colleges it was only 94 per cent of the 1950 total. The decline was sharpest among those colleges which had no TV competition. In the

television areas the colleges did relatively better as against last year. Last year they were up against unrestricted TV competition and they had a very bad season attendance-wise. This year, they had only restricted television, less television and they drew 96 percent of their 1950 attendance. Their rate of loss was slowed up. They did relatively better than they did in 1950.

Table II presents the same essential findings in a little different fashion. There it was in terms of proportion of colleges, in 1950 for instance the first column there we can see that the colleges which were faced with television competition in 1950 generally went down in attendance. Forty-three per cent of them went down, only 31 per cent of them went up. Where there was no television in 1950 the trend has worked quite opposite. There the greater number of colleges showed increases in attendance. Forty-eight per cent of them went up, only 38 per cent went down. In 1951 though, compared with 1950 we see that the television area colleges did a little better. Their situation was better than it was in 1950 when they had unrestricted TV. This year 31 per cent of them showed attendance increases over last year as compared with only 23 per cent of the colleges which faced no TV competition, so that finding merely supports what we found in Table I.

Table III is merely the same sort of figures broken down by region. There were three lines under each region, the first line shows what the colleges which were faced with television competition did in 1950 and 1951; the second one shows what those colleges which had no television competition did, and the third line shows the total attendance for the whole region.

I don't think we need to go through the whole series of figures in this table but in general we see the same thing we saw in Table I. The colleges where there was no television competition generally do better than those where there is competition and in 1951 as compared to 1950 the teams faced with TV competition did a little bit better.

Table IV presents some figures comparing large, medium and small schools and also introduces the factor of the attractiveness of the game, the performance of the teams and so on. The major point there, I think, is that more attractive games, as you might expect, consistently do much better than the less attractive games. The top of the table versus the bottom. However, regardless of the attractiveness of the game, the colleges which don't have television competition do better. At the more attractive games among all three sizes of schools those colleges with no TV competition do better than the ones with television competition. Among the large schools, for instance, at the more attractive games among large institutions with television competition, those games draw 111% of average attendance. Without TV they draw 136%. Among the medium schools the figures are 105, 139 among the small it is 100 and 119. Always you will find where there is no television competition attendance is higher.

That holds equally true for the less attractive games. These figures are much lower, the games draw more poorly but always where there is no television competition they draw better than where there is television competition. 70-85, 65-76, 62-72.

I will be glad to try to answer any questions you may have about this research.

MR. MURRAY: I have some remarks I'd like to pass along. I think I could work well up there.

CHAIRMAN WILSON: Please come up.

MR. MURRAY: The amount of information contained in this report and the size of it when we consider it is only a preliminary report, speaks amply for the commendation the Chairman made of the Television Committee and the work they put in on the entire program, and even though I enjoy a different viewpoint I nonetheless am appreciative of their sincerity and industry.

Of course, I couldn't be expected to digest the whole report as it went along. However there were certain specific references to the University of Pennsylvania, and for that reason I would like to say that as you probably know by this time for years at the University of Pennsylvania we have thought very well of television. Now these views at the University are not recent. Long before I came there a study was made and it was concluded that television was a remarkable new development which would make it possible to bring ideas, events, information and understanding to many millions of people through the combination of sight and hearing, of visual aid charts and pictures of actual events. So it was concluded television might be the means of keeping the people of a great democratic nation abreast with the information and the understanding needed in leadership in a modern world.

Thus my University very early began to cooperate in its laboratories and in its administrative activities with television. Eleven years ago, October 5, 1940, in an experimental arrangement with the Philco Corporation a football game on Franklin Field was first telecast. Ever since that time, with the exception of 1951, not only have the football games at Franklin Field been televised but a wide range of lectures and convocations and discussions and demonstrations have been put on television by the faculty and the students of the University of Pennsylvania.

June 6, of 1949 our University first televised in color, a surgical operation, and then developed in cooperation with C.B.S. and Zenith the techniques and methods by which the teachings of surgery can be assisted through the use of color television. A complete installation for this purpose will be included in our new Thomas Sovereign Gates Medical Clinic which is under construction.

The University of Pennsylvania doctors have demonstrated this method of teaching surgery before thousands of doctors at the American Medical Association Conventions in Atlantic City.

The surgeon with a small microphone in his mask explains to hundreds of other doctors, surgeons and surgical students just how he is performing his operation, what he is finding, even as they have opportunity, through remote control color television of watching closely as he works.

Our University Museum is weekly conducting a television program in which unique and ancient objects become a center of a quiz experts, and in an interesting manner millions of people learn more about the ancient background of our own and other civilizations and gain an increased understanding of the world.

To summarize, it is the policy of my University to integrate and use constructively each scientific advance with every department and every phase of our University life.

Well that hasn't much to do with sports, you can say but particularly apropos of our televising football games is the fact that a letter found in our inactive athletic department files, dated September 2, 1927, contains the considered opinion of the then Chairman of our Council on Athletics, and the now deceased Mr. Sidney Hutchinson, an insurance executive of international reputation, wherein that date he cautions the late Edward Bushnell, then a member of Pennsylvania's Athletic Council, to permit the radio broadcasting of only three football games that season, namely the Navy, Harvard, and Cornell games, as it was his fear this new means of communication might prove devastating to at-the-game attendance.

Even though this letter was written better than a quarter of a century ago, if you substitute the word "television" for "radio" it could very well have been written during the past year.

My own personal experience with this new medium of television antedates my recent association with the University of Pennsylvania by many years. Frankly my initial reaction was one of opposition to its employ in connection with events for

which I bore responsibility. In that respect they were not dissimilar to those Mr. Hutchinson expressed back in 1927.

My subsequent experiences however with the medium not only disproved my early fears, but, in addition, brought me to a recognition of its potent force as a strong ally in the promotion of events for which I was responsible. So being so indoctrinated I have no hesitancy in taking issue with my sincere well-intentioned colleagues who advocate the limited control approach, wherein each individual school may determine after consultation with its respective opponents whether or not to televise its home football games. I feel confident in a short space of time this will be recognized by all as not only the wise, but also the necessary means of utilizing this medium.

One of the features of the Control Plan calls for serious review and let me preface my remarks before I get into this by saying that I present these views of mine not in the spirit of opposition, but rather being a firm believer that we can arrive at an answer for the protection of us all only through the frank exchange of viewpoints on the issue. So in the spirit of cooperation rather than opposition, I will take off on some points which I feel can present another viewpoint on the matter.

One of the first features of the Control Plan that calls for serious review in my opinion because it perhaps is the most imminently dangerous one focuses on its apparent illegal features. This complication should cause us all to pause at length since this very moment the National Football League is being sued by the Department of Justice for imposing television restraints on its members.

In the Pro football trial, which commenced only two days ago in Philadelphia, it is highly disturbing to learn of the very real possibility that this Association may find itself in the role of a defendant unless each and every member is permitted to make such arrangements as they individually wish to make with their respective opponents for the televising of their home

football games. That portion of the argument in the Pro case which should prove alarming to all of us can be found in the portion of the Oral Arguments on the League's motion to dismiss the complaint which was denied, and these are the verbatim remarks in the record:

The Presiding Judge was Judge Grim and addressing his questions to Mr. Epes of the Justice Department who was prosecuting the case, the Judge asked this question: "Do your theories cover the college situation, the situation where the colleges agree to black out certain areas at certain times. For instance, the University of Pennsylvania, I believe has not permitted to televise its games because of the agreement among the colleges. Would your theory cover the college situation as well?"

The gentleman from the Justice Department replied: "Well we feel that any agreement which restricts the sale of broadcasting and televising rights by a group, by group action, and takes away from an individual team its right to make its own determination is a violation of the Sherman Act."

The Court came back: "Whether it be an institution not for profit, like the University of Pennsylvania, or whether it be the Philadelphia Eagles, which is definitely a business for profit, would the same rule apply?"

Mr. Epes said: "We think so, Your Honor, although of course it is not the issue here. But, we think so. A combination and conspiracy among a group of sellers which curtails the freedom of each to exercise an independent judgment on the areas in which and under what terms and conditions he will sell, have been consistently condemned under the Anti-Trust Laws."

Now that warning in itself I believe is sufficient evidence that the course followed by the Television Committee was channeled along lines which certainly flirt with, if not actually invade the areas forbidden by the Anti-Trust laws of the United States.

At this point because we are specifically mentioned in the TV report I want to go back to page six of the report where it says the University of Pennsylvania "appealed" to the Justice Department. The exact connotation there I think calls for clarification. What the University of Pennsylvania did when its counsel told it that the actions were in his opinion a violation of the Sherman Anti-Trust Act, was to send a letter to the Justice Department and asked them if they ever either formally or informally advised the N.C.A.A. TV Committee whether the plan they were operating under was legal or illegal. I received a letter back from him in which he told me I could make public the enclosure. The enclosure was a letter addressed to Mr. Jos. Rauh, Jr., Esquire, Counsel for the N.C.A.A., from Morison of the Anti-Trust Division of the Department of Justice.

On November 30, 1950 an Association Press release stated that a member of the N.C.A.A. TV Committee was quoted as having said 'N.C.A.A. has not heard a word from the government since April 1950.'

A letter dated June 20, 1951 addressed to Mr. Joseph L. Rauh, Jr., Esquire, Counsel for the N.C.A.A. TV Committee from H. Graham Morison, Assistant Attorney General of the Anti-Trust Division of the U.S. Department of Justice and supplied to the University of Pennsylvania in reply to its request as to advice whether Mr. Morison's office had either formally or informally approved the N.C.A.A. TV moratorium plan reads as follows:

"Dear Mr. Rauh. The Anti-Trust Division has been disturbed by numerous statements in the press made by sports writers and editors to the effect that the Department of Justice approved the plan of the N.C.A.A. for limited television programming of collegiate football games next Fall.

"The Television program of the N.C.A.A. was not submitted to the Department; rather the Anti-Trust Division requested a submission by the Association of the details of the plan because of its anti-trust implications.

"You will recall that upon the submission of the plan members of my staff joined me in meeting with representatives of the Association to discuss the plan. The Department did not approve the plan and instituted a full investigation which is now under way.

"In view of the foregoing I am sure that your client, the N.C.A.A. will wish to clear up the erroneous statements in the press as to the Departmental approval of the plan by making an appropriate public statement at the earliest possible moment.

Sincerely,
(Signed) H. G. Morison
Assistant to the Attorney-General

So gentlemen, the University of Pennsylvania's "appeal" took the form of a letter just asking whether approval had ever been given formally or informally and that letter sort of clarifies the situation, I believe.

Now in the public press commencing in June and continuing into November of last year, and now into January, 1951, official and unofficial legal opinion has predominantly expressed itself as feeling that our Association was acting illegally.

In light of this, the argument as to whether or not live television hurts the gate or not becomes relatively unimportant, because we, least of all, should adopt the attitude that the needs justify the means.

Conscious of our responsibilities to our institutions as educational centers, charged with the development and training of the youth of the land, and interested in meriting the respect of the American citizenry, it is incumbent upon us to formulate our 1952 television policy along unquestionably legal lines, bearing in mind the legal storm warnings that have been sounded from the Justice Department and other sources, and being always conscious that the only direct manner in which the Anti-Trust Division can speak to us is with the filing of a suit.

Very shortly we will be called upon to pass upon certain proposed and rather sweeping grants of authority in the form of amendments to our present Constitution. Included among these proposals are amendments which, if favorably acted upon, would give this Association for the first time power to legislate in connection with the televising of intercollegiate sports.

Recently the professional baseball people deleted from their Code that portion of their regulations which imposed a restraint on individual league members with respect to broadcasting and televising.

In the Pro football league suit, it is my understanding the crux of the complaint revolves around the restraining article in the League's constitution and by-laws, which limits their individual members with regard to broadcasting and televising. It should be borne in mind that, in suing, the Government is not saying that you must televise, but rather that individual members of a group or association should not have forced upon them an agreement as to how any two teams engaged in a contest worthy of coverage by television or radio or both may act.

Certainly then, it would be ill-advised action on our part to now amend our Constitution along lines that the professional baseball people have recognized as undesirable, and the pro football people have found to be challengable on the grounds of illegality.

Today good public relations, always vital to our institutions, is more necessary than ever before. The dramatic qualities of intercollegiate football competition curiously enough establish that activity as one of any institution's strongest instruments to create good will among its friends and alumni, from whom, according to a survey reported in the New York Times, better than 1300 educational institutions are attempting to solicit approximately 3 billion dollars to provide

for development programs, and to meet balooning expenditures.

To deprive that section of our interested population of the opportunity of viewing our athletic contests over television cannot possibly have any but an adverse affect on their good will toward us, and leaves us open to charges of being remiss in discharging our obligation to the over-all university attempt to constantly hold a position high in the public regard, and not low in its esteem.

As the 1951 controlled television program moved into its late October and early November stages, this adverse affect on the public began to manifest itself.

Now to form a strictly unprejudiced opinion in this particular connection, I feel that, against the exclusively favorable comment prepared in pamphlet form by the N.C.A.A. TV Committee, the opinions which appeared on the editorial pages of many of the leading newspapers of the country, unfavorable to the test program, should be weighed carefully.

Such publications as the Denver Post, the Chicago Tribune, the Dallas Morning News, the Washington Post, the Philadelphia Inquirer, the Detroit Times, the Milwaukee Journal, the Indianapolis Star, and the New York Daily News, saw fit to comment critically, and some even facetiously, on the program.

The commercialization of college athletics has been recognized over the years as one of its prime evils, and voluminous is the material and many the utterances dealing with that to-be-avoided temptation.

Aside from the undesirable effects of commercialism in sports as they immediately register with us as athletic directors, we, as the heads of just one department of the many in our institution's educational structure, should be mindful that in recent years all educators have been much concerned over the

apparent growing tendency on the part of Government to classify educational institutions in with business concerns, in connection with taxation, labor relations, and other related activities. This has been the result of an increasing development by the institutions of activities conducted along business lines.

If the television restrictions are to be continued it seems to me to be inevitable that we will be subject to an anti-trust prosecution which will constitute another major step and a most unfortunate one toward our being treated as business enterprises.

Now in connection with the experiment itself, without trying to become too statistical and using the "People Present" type of survey, my University, situated as it is in one of the prime TV testing rounds of the nation was delighted to find indications are the present study confirmed its belief, based on its own observations, that its activities in television had no adverse effect on its neighboring institutions. Pennsylvania would never consciously injure or work a hardship upon its sister institutions under any conditions.

A review of 1949, 1950 and 1951 attendance figures, supplied by N.W. Ayer and Sons as part of its continuing survey, for the 13 colleges and universities within a 60 mile radius of Philadelphia, excluding the University of Pennsylvania, indicates that from 1949 to 1950 there was a decline in attendance at these colleges of approximately 600 per game played, with seven colleges showing an overall increase in attendance, and six showing a decrease in attendance.

From 1950, wherein no TV restrictions existed, to 1951, with controlled TV, there was a decline in attendance of approximately 1300 people per game, with one college showing an overall season increase, seven colleges showing a decrease, and five colleges holding approximately even, in per game attendance.

During this same period, attendance at the University of Pennsylvania football games declined from an average of 54,069 admissions per game in 1949, to 49,364 per game in 1950, with uncontrolled TV. In the 1951 season, with controlled TV, per game attendance suffered an alarming decrease to 38,785.

Now does this not indicate (Particularly in connection with the smaller colleges) a steady decline beginning in 1949 and prior thereto and accelerated in 1951, is due to some circumstances or a combination of circumstances other than live television?

A development that would lend substance to this observation is the fact that while the eastern seaboard apparently is suffering a sharper decline in attendance than other sectors it is rather significant to note that since the end of last season some 35 colleges with full knowledge that television in 1951 would be on a very limited and controlled basis, saw fit to give up the sport of football, primarily because it was financially imprudent, and in this total are representatives from the mid-west, south, southwest, and far west, in addition to the east.

Gentlemen, I will be the last fellow in the world to minimize the importance of the position we all hold as athletic directors of our institutions and also be the last to aggrandize the relationship to the overall college picture. The Universities and colleges of America long ago recognized the tremendous educational advantages of the medium of television and recorded their interest in filing applications for the allocation of channels for their own specific educational or commercial purposes. Perhaps your own institution has already filed or is contemplating filing such application.

It is inescapable that eventually your institution will be utilizing this medium for educational purposes. So I say to you again in the spirit of cooperation, let us not as athletic directors formulate in our 1952 plans any present bars or legal prejudices

to the future realization of institutional television objectives with which we are immediately concerned. It is planned for the maximum service to the maximum number of people. I think the maximum number of dollars will take care of themselves.

I appreciate again the opportunity of presenting what I know is a minority viewpoint on this subject. I again wish to compliment the TV Committee with whom I have been in frequent touch during the past, for the fine work they did, I am sure that it is a very complicated and perplexing problem. Because we all feel free to express our views we will come to the right answer and have no trouble at all with Mr. Law.

CHAIRMAN WILSON: I will ask Mr. Rauh of Washington to express his views.

MR. JOSEPH RAUH: I take as a very serious responsibility, the giving of a legal opinion to the colleges of the country. I believe, however, that the plan of 1951, and any similar plan is entirely legal. And therefore I feel it my duty to state that.

In arriving at that opinion I consulted with various persons both in the practice of law, and in the teaching of law, in order to carry out a responsibility as great as this. And I feel confident in the statement that I have given to your Television Committee that their action during the past year and their proposals for next year are completely and entirely lawful.

Now I recognize that as in most legal subjects there is a difference of opinion on this question. You have heard the differences this afternoon. Mr. Murray has stated his own counsel's views on the matter. However, a difference of opinion shouldn't frighten anyone because there is a difference of opinion even in Mr. Murray's camp. The Department of Justice is itself divided at the moment and is itself divided against the Department of Justice as of two years ago. Two years ago the Department of Justice gave a ruling that a plan of the kind that we adopted was entirely legal. It is only in the last few months

that there has come a reversal of this opinion and even today many of the attorneys in the Department of Justice feel that the original ruling of two years ago was correct and the one today is erroneous.

Now, I don't know that I could do a good job in explaining the legal issues to a group of Athletic Directors, but I shall try because I think at heart the issues are simple. The law forbids a restraint of trade that is unreasonable. There is no law that forbids every restraint and the sole question at issue is whether what the Committee did and what it proposes is reasonable. I believe it to be such.

Now the question of reasonableness depends on various facts. The first one is, are the facts of the N.O.R.C. correct? That is, is there a reasonable relationship between television and gate attendance? I think when the Committee went to the best statistical agency in the country and got its figures, it was acting in a reasonable fashion.

The second big point is, what is the purpose of the programs. Well the purpose is to protect the athletic and physical training programs of the nation, again a reasonable purpose, so in my judgment the issue comes down to: Is this reasonable? And the facts show that it is.

Let me give you one example which I think clarifies this for me and it did for some of the members of the Committee, and the Council, when I tried to explain it yesterday. I think that the colleges of the country have the undeniable right to come together and protect themselves against a threat from the outside, be it television or anything else. And I would like to give an example without treading upon your province and without suggesting that the N.C.A.A. would legislate on the example that I am about to give, but I want to give it for its illustrative purposes.

Suppose the N.C.A.A. at some future time should ban or limit Bowl games. Now the restraint in that connection is

identical with the restraint here. The sponsors of the Bowl claim that they have the right to deal with each of the colleges individually. The networks, claim they have the right to deal with each of the colleges individually. I say if it is reasonable in the case of the Bowl games, and I tell you that the Department of Justice would be laughed out of Court if they tried to do anything about a restriction on Bowl games, I say it is equally reasonable here.

Now you have heard Mr. Murray say that there is a possibility that the Department of Justice might at some future date bring a suit. There is that possibility and no man can stand in front of you and say that there was not. However, I would like to point out the facts as I understand them.

The Department has brought a test case against the National Football League. It has stated that until that case is settled, until the law is settled definitely in that case it will take no further action. Therefore, the question arises when is action likely to come in the National Football League suit? It would be my judgment that that would come in a year or two or three.

Nothing that happened in the court room on Tuesday has any effect on our case. Indeed the only man who was stating that there was anything wrong with what we were doing seems to be the representative of the Department of Justice who, speaking there in the court room, took the diametrically opposed view to the view of the Department of Justice two years earlier.

Now it seems to me that the assumption was made here that there is something wrong in doing something that risks the opposition of someone who might bring a suit. On such a theory one would never take any action to protect themselves. Indeed one might say that the normal resistance to erroneous actions of government has got to be by taking the action you believe is correct and let the chips fall where they may. Indeed if Mr. Murray will permit, I will say that is the doctrine that has been espoused quite often by the President of his University.

Now the question arises that certain institutions might feel that their own counsels would take a position not in agreement with the one I have stated. I would like to say to those institutions what I said to the counsel for the University of Pennsylvania last June, when Mr. Drinker called me on the telephone. We discussed the legality of this plan. I argued then as I have argued with other people, some I have convinced and some I haven't, that our plan was legal. Mr. Drinker said "I regret to say I cannot go along with your opinion, therefore I cannot advise my college to take an illegal act." And I pointed out to Mr. Drinker that there was no occasion for his college taking an illegal act. If he felt that the action of the N.C.A.A. was wrong and unlawful, their simple answer was not to televise their games and not to participate in the program. By so doing he completely protected his own institution but in no way damaged the other 300 colleges which wanted to go along with the program and I point out to you that the ultimate action of the University of Pennsylvania was along that line, that they did run no risk of any illegal action or any claim that they had so acted.

And I would say to any other institution as to which there is some doubt in their minds, the answer is not to break the program that the majority seeks, but the answer is not to participate in it and there will be no dangers of any illegal action.

Now it seems to me that the question of what is going to happen in the Football League and what isn't going to happen is a good deal in the future. If the Football League case goes in favor of the Football League naturally we have no problem whatever. If, however, it should go adverse to the Football League I still believe that our program, our plan is legal because of two distinctions between our situation and the Football League. First the restrictions in that case are much greater than they are in our situation. We had live television competing with college football. They do not. It seems to me

that that is as great a distinction as you could get. And secondly, the purposes are entirely different and the purpose is a consideration for anyone in determining reasonableness and I believe regardless of the outcome of that suit, regardless of anything that has happened in the baseball situation, regardless of the fact that the Justice Department has now reversed a position taken two years ago, the ultimate outcome of this situation will be one in which our plan will be declared legal.

CHAIRMAN WILSON: We have in our membership two men of long experience in law. I would like to ask if they would care to comment. First Dean Nutting, the Dean of the Law School of the University of Pittsburgh.

DEAN CHARLES B. NUTTING: Perhaps I should say, Mr. Chairman, that I am a reformed lawyer because I haven't been engaged in the active practice of law for a good many years. But there are two or three things I think I might say in connection with the presentation that has been made this afternoon so ably by so many people. I should like to concur in Mr. Rauh's statement that although this legal situation has been presented as a very complicated and technical matter I think the issues are really very simple ones and I think they can be summed up merely in these ways.

First, is unrestricted television a danger to the program of member institutions? I take it on the basis of the careful and impartial survey which has been made and presented to you this afternoon there is no doubt whatever on that point. There is not only a substantial danger to the football but also a danger to the integrated athletic programs of member institutions if unrestricted television is to be permitted.

The second question is, can this danger be avoided only by concerted action? And I submit to you again that is perfectly apparent from the report of the Committee and the discussion from the floor.

Gentlemen this idea of individual initiative, individual freedom, is an important one. But the idea of the concerted action is as old as the Republic and probably goes back farther than that. I am reminded of the statement of another eminent Philadelphia gentleman: "We must all hang together, or we will hang separately." And I suggest to you that is a very pertinent observation in connection with the problems that confront us today.

So if it is true that unrestricted television is a danger to our programs and if it is true that that danger can be avoided only by concerted action, then the only thing we have left is the spectre of illegality which has been raised for us this afternoon. I shan't go into a technical legal argument even to the extent that was done by my learned friends, Mr. Rauh and Mr. Murray. It seems to me it comes down simply to this. Is action which is necessary from the standpoint of these many institutions, which is suggested as a result of a continued and careful survey and which we believe to be in the public interest, to be made impossible because of an interpretation of an Act which was passed in 1890, for the purpose of curbing the activities of great industrial combinations? Because that is what the Sherman Act is.

I agree fully with Mr. Rauh that the only test that we have here, which we can apply, is the test of reasonableness. I do not believe we should be dissuaded from our point of view or from our purpose by a statement which may have been made by an attorney of the Department of Justice in argument with a Judge in a particular lawsuit in its preliminary stages.

I think the issue is whether the law prevents us from protecting ourselves. I don't know whether I should mention this in front of a group of this kind but I get many of my cultural ideas from the comic strips and one of the strips I read most avidly is Li'l Abner. Those of you who read Li'l Abner know the Schmoo, not the Schmoe, the Schmoo is an animal too good to live and is willing to sacrifice itself in order to

satisfy the pleasure and advantage of others, other people and perhaps other animals as well. The Schmoo likes to commit suicide so other people can eat him up. The question I think before this house is whether the government of the United States in its interpretation of the Sherman Act requires the members of the National Collegiate Athletic Association to be Schmoos. I suggest to you that it does not and that this program which has been so carefully worked out and implemented by this very industrious and able Committee deserves your careful attention and your favorable action.

CHAIRMAN WILSON: I'd like to call on Professor Ralph Aigler, who has been a member of the N.C.A.A. for many many years and who might wish to express his views.

PROF. RALPH AIGLER: In the more than 30 years that I have attended meetings of the N.C.A.A. I have had many occasions to stand before the delegates of the convention but I think this is the first time that I have had the opportunity to appear before the delegates in a capacity in which I earn my living.

Although I have very definite ideas about television and its effect upon college athletic programs, I am not going to take up any time discussing that. When a client comes to a lawyer and tells his lawyer that he has done so and so, and then asks the question: "Where do I stand? What are my rights? What are my duties? What shall I do?" I suppose every lawyer either consciously or unconsciously puts to himself this question: "Let us assume that this situation factually speaking were shaped up for litigation and presented to the Court. How would the Court decide it?" And thus every lawyer in advising a client obviously, more or less, is somewhat of a prophet.

Now, if the National Collegiate Athletic Association as a client, which it is not as far as I am concerned, were to come to me as a lawyer and tell me:

"Today we are confronted with this factual situation, this is what we plan to do. We either plan to carry on a restricted television program such as that we have had during the last year."

Or even if they said to me "We have the plan to completely bar all live television. Would we be running a serious risk of being prosecuted successfully by the U.S. Department of Justice?"

Although I don't pretend to be an expert in the field of anti-trust, or in constitutional law generally, I have given not a little thought to this matter. I have talked about it with a good many men, all over the United States, men who were distinguished law teachers, men who were distinguished at the bar, with very large practice and experience in anti-trust litigation, and to very distinguished judges, who have had occasion to sit in many of these anti-trust cases. On the basis of my own study, on the basis of what I have learned from them, I would have no hesitancy in saying to the N.C.A.A. as my client "You are not running any great risk in going ahead."

Now I recognize as every lawyer must that there isn't any law suit that is a dead certainty. There is always the possibility, but I would say that the chances were not merely 50-50 in this situation. I don't think I am overstating it when I would say that the chances are at least five to one.

I am not particularly alarmed by the fact that the Department of Justice has interested itself in this matter. After all the Department of Justice, as an arm of the government, is peculiarly susceptible to political pressures and there are plenty of politicians over this land who see in this television situation the chance, as they think, to further their own political fortunes and there isn't any question that they have exerted a lot of pressure on the men in the Department of Justice.

I don't know whether the Department of Justice would institute a suit against the N.C.A.A. if we were to go through

with this program or even if we were to completely ban television. But I am perfectly willing as far as one person is concerned, to take a chance because I think we would win the lawsuit.

Now Mr. Murray quoted from a letter which was addressed to Mr. Rauh. It was from Mr. Morison, I believe, in which he said he wanted it distinctly understood the Department of Justice had not approved the legality of the N.C.A.A. Plan. That is a far different thing from saying that the Department of Justice had concluded to disapprove it. I would emphasize what was said by Mr. Rauh, in regard to the appearance of Mr. Epes on the behalf of the Department of Justice in this case in Philadelphia. If he is a lawyer worthy of being on the payroll of the Department of Justice, of course he should have taken the position he took when those questions were put to him by the Court. He is there as an advocate in the hope that ultimately he will win that lawsuit.

So in conclusion let me say simply this, that when the time comes as far as this Association is concerned to vote on this television matter, I hope you will feel perfectly free to vote your convictions on it, on its merits, without any fear or consideration being given to the legal aspects. If we have to face a lawsuit, well worse things than that have happened. You can always sue somebody you know. The question is whether or not you are going to win. I can sue my good friend Tug Wilson here for a lot of different things, but the chances are, of course, I'd lose the lawsuit.

CHAIRMAN WILSON: Is there further discussion? Then if there is no further discussion I'd like to call on Tom Hamilton who worked so hard as Chairman of the Television Committee. He has a Resolution to present.

MR. THOS. HAMILTON: After a session of this type I believe it is customary for the Committee, which has partici-

pated in the open forum, to present a resolution to be carried to the floor of the convention at the regular business session.

The Television Committee has prepared such a Resolution and I will present it to the assembly:

"WHEREAS, the preliminary results of the survey of the National Opinion Research Center demonstrate that the N.C.A.A. plan of restricted television for 1951 substantially reduced the adverse effects of television upon attendance at college football games and which had resulted from unrestricted live television in 1950;

"WHEREAS, the preliminary results of the N.O.R.C. survey also demonstrate that the adverse effects of television upon attendance at college football games are still a matter of grave concern and that unrestricted live television would seriously jeopardize the future of college football and of the intercollegiate and intramural athletic and physical training programs dependent upon football; and

"WHEREAS, the report of the N.C.A.A. Television Committee, taking cognizance of the preliminary results of the N.O.R.C. survey and also of the great interest of the public in viewing college football games, has recommended against either the extreme of a complete ban on live television or the extreme of unrestricted live television and instead has recommended in favor of a limited and controlled television program for 1952; and

"WHEREAS, the final results of the N.O.R.C. survey will not be available until March, 1952; and

"WHEREAS, the report of the N.C.A.A. Television Committee stresses the dangers to the game of football if two or three institutions are able to monopolize the television networks and thus obtain financial rewards of such magnitude as to place irresistible premiums on successful teams; and

"WHEREAS, efforts should be continued to find ways to promote the public interest in television without destroying attendance at college football games and the athletic and physical training programs dependent upon football;

"NOW THEREFORE BE IT RESOLVED that the members of the N.C.A.A. agree upon a program of limited live television for 1952, controlled and directed by the N.C.A.A. and having the following objectives:

(1.) To minimize the adverse effects of live television upon attendance at college and high school football games;

(2.) To spread television, within the limits of such controlled plan as may ultimately be adopted, among as many colleges as possible;

(3.) To provide television to the public to the extent consistent with the first two objectives.

"BE IT FURTHER RESOLVED that the 1952 television program shall be worked out by a Television Committee to be appointed by the Council of the N.C.A.A.; that the Committee shall give full consideration to the final N.O.R.C. report when available; and that the Committee shall submit its plan to the membership for adoption by mail referendum vote of two-thirds of those voting.

"BE IT FURTHER RESOLVED that no member institution of the N.C.A.A. shall make any commitments, arrangements or contracts for the televising of college football games for the 1952 season until the adoption of the approved plan and then only in conformity with the provisions of the approved plan.

"BE IT FURTHER RESOLVED that the Committee shall make special efforts to assist the development of pay-as-you-see television and the further extension of delayed television, which hold such great potentialities for the future of college football."

CHAIRMAN WILSON: Do I hear a motion for the approval of the resolution for submission to the Business Session?

MR. AIGLER: I so move.

(The motion was seconded.)

CHAIRMAN WILSON: Is there discussion? If not all those in favor signify by saying "aye." Contrary minded the same. The motion is carried.

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DEFENDANT'S EXHIBIT B-3

Year-end Report

OF THE

1952 N.C.A.A. TELEVISION COMMITTEE

THE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

I.
DEVELOPMENT OF NCAA TV PLAN FOR 1952

Introduction

Following the NCAA's experimentation in 1951 with various ways and means of limiting the telecast of college football games, Co-Chairman Tom Hamilton and Ralph Furey of the Association's 1951 Television Committee, when presenting their Committee's final report to the Cincinnati Convention one year ago today, made these statements in the light of their year's experience:

> "We confidently believe that a publicly-acceptable program can be developed for the future under which television and college football can live side by side. As the sports public comes to understand the issues, it will recognize the NCAA efforts in this field as the best and only means of protecting the physical well-being and physical development of the sons and daughters of the nation."

That the Association concurred in these views—and that the assembled athletic administrators were convinced that the rapid development of television had created for the colleges a serious problem which could be solved only by employment of some form of limitation upon football telecasting—these facts were established with certainty when the Convention immediately decided by vote of 163 to 8 to adopt a policy of television control for the football season of 1952.

Findings by NORC

Supplementing the studies of the effects of television upon college football attendance which it had made for the 1949 and 1950 football seasons, the National Opinion Research Center conducted a full-scale research project in this area in 1951, its work being expedited by various of the special situations created by different features of the NCAA experimental plan

for that year. Headlining the extensive report of findings submitted by the NORC were the following summarizing statements:

> "Television continued to exercise an adverse effect on college football attendance in 1951. As in 1950, colleges located outside of television areas continued to hold or surpass their pre-television 1947-48 attendance, while those colleges which were exposed to TV competition found their attendance down approximately one and one-half million or 15% from their 'expected' pre-television levels. Attendance is particularly off in those 'heavily saturated' TV areas where 40% or more of the families are set-owners.
>
> "It is clear, however, that the NCAA's 1951 experimental plan of limited telecasting of college games succeeded in reducing television's harmful effects on attendance. In 1950, when there was unrestricted televising of college games, the 'TV differential'—the difference between the relative attendance trends of colleges exposed to television competition and those not exposed—was significantly greater than it was in 1951, when football telecasting was sharply restricted.
>
> "Had unlimited telecasting continued to rule, and the 1950 TV differential remained the same, the loss in 1951 attendance compared to the 'expected' 1947-48 base would have been substantially in excess of two million admissions instead of the actual drop of one and one-half million. In fact, as the proportion of set-owning families rose in TV areas, it would have been reasonable to assume that the 1950 TV differential and the corresponding loss in attendance would have been even greater than the conservative estimate of two million."

Also significant was the following brief review and prognosis incorporated in the NORC report:

> "The history of television's impact on college football attendance can be summarized as follows:

'In 1948: imperceptible, because there were fewer than one million sets installed in the country.'

'In 1949: perceptible but small; still only three million sets.'

'In 1950 (nine million TV sets): substantial attendance declines in television areas in the face of attendance gains elsewhere.'

'In 1951 (close to 14 million TV sets): falling attendance everywhere, but a relatively smaller loss in TV areas with the end of unrestricted telecasting of college games.'

"What the pattern for the future will be cannot now be predicted, except that as saturation remains high and college games are available on TV, actual attendance will certainly continue to be adversely affected. The degree of the adverse effect depends upon factors which are not known at this time. Set-ownership is still expanding rapidly, and when additional areas are opened up to TV-reception, the competition will increase."

The NORC surveys are the only comprehensive attempt to measure statistically the effect of television upon sports attendance. The surveys have stood unchallenged as to their methods of approach and have come under criticism only from self-serving interests who have been unwilling to do more than criticize. Above all, it should be remembered that the NORC was originally chosen for this important work by the four television networks as well as the NCAA and its integrity and capability cannot be challenged.

As the Cincinnati vote demonstrated, the NCAA member colleges were convinced by the NORC's figures that football on the television screens can and does do irreparable damage to live football in the stadiums. In most instances, however, the athletic representatives of these member institutions did not need research and surveys to prove the point for them. They had seen what had happened to their ticket sales since the

advent of TV; they well knew, even before the first scientific studies had been undertaken, that the problem being built up by the new television medium was a real poser and would have to be solved successfully—and speedily—if collapse was to be avoided in the existing structure of intercollegiate football.

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DEFENDANT'S EXHIBIT B-4

Year-end Report

1953 N.C.A.A. TELEVISION COMMITTEE

THE
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

I.
DEVELOPMENT OF NCAA TV PLAN FOR 1953

Reason for Being

After a year of varied TV experimentation in 1951, the NCAA in 1952 adopted a survival plan—a plan designed to permit college football's survival despite the widely recognized though not uniformly acknowledged detrimental impact which television had been bringing to bear upon it.

The TV plan adopted and used by the NCAA in 1953 was in many ways similar to the 1952 program, though it contained a number of improvements instituted in light of experience gained in the operation of the survival plan. Its primary objectives were to provide a basis upon which football and television could live with each other throughout this particular year, and to guide the way to some more permanent arrangement under which football and television could continue to live together in the future.

Research Findings

When the operation of the 1952 plan had been successfully concluded, and the NCAA assembled in Washington, D.C., for its ensuing Convention in January, 1953, the member college representatives received interesting but to them not surprising information from the preliminary report of the National Opinion Research Center. They were familiar with and had confidence in the analyses of this agency, for the NORC had been originally selected by joint action of the NCAA and the four television networks to measure statistically the effects of television upon football game attendance, and in conducting a scientific survey of the 1952 collegiate season the NORC had been making a study of this sort for the fourth successive year.

Highlighting the report were the following statements by the NORC research directors:

"... the competition of telecast games continues to hurt college football attendance. For the country as a whole, paid attendance in 1952 was about the same as in 1951, but colleges facing TV competition remained 16 per cent below their average pre-television 1947-48 base, while colleges which were not exposed to television competition drew 10 per cent larger audiences than they did in 1947-48.

"It is extremely significant that under the continued NCAA program of limited football telecasts, colleges with TV competition were generally able to maintain their 1951 levels of paid admissions, despite a 40 per cent increase in television set ownership, and the extension of network television football games to many areas in the south, southwest and mountain states which were not affected by TV competition in 1951. Apparently, the general economic improvement in personal incomes, which further boosted attendance in areas without any television, largely offset the downward pressures of increased TV saturation and the slight decline in student enrollment in TV areas. It should be noted, however, that while the colleges in TV areas did manage to hold to their 1951 levels, they failed to share in the gains recorded where television was not a factor.

"While it is not possible to show precisely what would have been the effect of *unlimited* telecasting of football games in 1952, it is clear that the NCAA *limited* program substantially reduced the losses in attendance caused by television. The figures show conclusively that the presence of television competition hurts attendance. It is obvious, therefore, that the more television, the greater the loss; the less television, the less the hurt. The TV differential under limited televising in 1952 was held about the same as in 1950 under limited telecasting, in spite of the fact that since 1950 the number of TV sets has more than doubled. Without the limited program, it is not hard to estimate what would have happened to attendance.

"In 1950 with unlimited telecasting, we found that colleges in the few heavily saturated areas at that time lost about 13 per cent more attendance than did the average of TV areas. In 1952 virtually all of the TV areas had become heavily saturated. We would thus have expected that with a continued policy of unlimited televising, the TV areas—all other things equal—would have lost 13 per cent of their attendance since 1950. In fact, under the NCAA limited program, these losses have been held to four points. The limiting of college football telecasts during the last two years has thus saved a probable loss of about 10 per cent in attendance in television areas—and this figure is, if anything, a minimum statement because of declines in real income and student enrollment."

"With unlimited telecasting at present saturation level, one can only assume that attendance in TV areas, which will soon include the whole country, would again turn sharply downward."

* * *

"In summary, the preliminary research findings indicate that the second year of limited television has again succeeded in checking the harmful effects of TV competition. Colleges without any TV competition, however, are definitely better off than colleges with even limited TV competition. In view of the generally high saturation in most present television areas, the likelihood is for more stable attendance levels in these areas, assuming that the type of TV competition and other non-TV factors, such as economic conditions, remain about the same."

Continuing in the conviction that the serious problem created for collegiate athletic administration by the more and more clearly demonstrated devastations of TV upon football gate receipts, the NCAA membership, foregathered at the Washington Convention, took action reflecting its confidence in limitation of football telecasting as the best available solution to the problem and the most effective measure for the avoidance of collapse in the existing structure of intercollegiate football.

The delegates voted, 172 to 13, to extend the Association's two-year-old policy of television control through a third season, 1953.

Since the NORC findings were an important factor in bringing about this action, it should be noted once again that this agency's surveys, made at NCAA instigation, embody the only comprehensive attempt thus far undertaken to determine with statistical accuracy the impact of television upon sports attendance. These surveys have stood unchallenged as to their methods of approach and have been attacked only by self-serving interests which were unsuccessful in establishing weaknesses and so could do no more than criticize. Incidentally the validity of NORC research determinations were spectacularly substantiated during this past year when the agency's analyses, prepared for the NCAA, proved to be vitally important defense evidence in the government's suit against the National Football League. This much-publicized litigation is explained in a later section of this review.

The NORC's final report for 1952, released on April 8, 1953, and distributed at that time among the NCAA membership, verified the findings which had been revealed to the Washington Convention, and further underlined the facts (1) that live telecasting of college football games again damaged the gate in 1952 and (2) that this harm was reduced appreciably by the NCAA's exercise of control over telecasting.

Outstanding among the points made by the NORC report were the following:

1. In areas where there was no television competition in 1952, paid admissions were 10.5 per cent better than in the pre-TV years 1947-48, but where TV competition was present attendances were down 16.2 per cent. With 20 million TV sets in operation during the 1952 season, this 26.7 per cent attendance loss due to television would have approximated 40 per cent but for the limitation of telecasting by the NCAA.

2. In 1950, when there were no restrictions on telecasting, the colleges in those areas which already had large numbers of TV sets lost 40 per cent of their "expected" attendance because of TV competition. Under the controlled TV plans administered by the NCAA in 1951 and 1952, these losses were cut at least 13 per cent.

3. As TV set ownership increased, from 3 million in 1949 to 20 million in 1952, the adverse effects on football attendance have also increased, though in 1952 there was evidence of a leveling off in the most heavily saturated areas.

4. More attractive games were harder hit by TV than less attractive games. This was the case because the more attractive games of any college draw the greater number of "marginal" or less interested fans, and the fans in this category are most likely to stay away when substitute game is provided on television.

5. Because large and medium sized colleges also depend on the "marginal" fan, they were hit harder by television than were the small colleges whose attendance is composed largely of students, local alumni, and other regular fans.

6. There was still no evidence in 1952 that the impact of TV on football attendance represents a "novelty effect" which will wear off. On the contrary, all factual experience indicated that attendance losses are not regained after a year's ownership of TV.

7. Television has thus far failed to produce any strong stimulative effect on the box office, and, because of the nature of the college football market, it is not likely to do so in the future.

The 1953 Television Committee believes that, with its final report on the 1952 season, the NORC convincingly completed

its proof of television's jeopardizing threat to college football. It tellingly summarized the case with the succinct statement that "under conditions of heavy saturation and unlimited telecasting . . . television produced a 40 per cent decline in the expected stadium attendance." The Committee feels that continuing statistical studies are essential, but rather for the purpose of providing guidance for the future than as the test of real or potential damage.

The Washington Convention

The proposal for continuation of television restraints in 1953, adopted by the sizeable majority of 172 to 13 at Washington on January 10, 1953, had the following text:

1953 Resolution

Whereas, for the past three years the member institutions of the NCAA have been working together, diligently and democratically, to meet the threat of television to college football and to the athletic and physical education programs dependant upon college football; and

Whereas, the studies made during each of these past three years by the National Opinion Research Center of the University of Chicago have demonstrated beyond any reasonable doubt that television has a serious adverse effect upon attendance at college football games, thus confirming the experience of the NCAA athletic directors and, indeed, the entire sports world; and

Whereas, the member institutions of the NCAA are deeply concerned lest a few institutions monopolize the television networks and thereby obtain publicity and financial rewards which would place irresistible temptations for the development of winning teams; and

Whereas, the provision in the NCAA TV Plan for 1952 which permitted a member institution to appear on a TV network only once during the season, proved an effective means of preventing such monopolization of television; and

Whereas, it is the sense of the member institutions of the NCAA that this one-appearance rule be continued for 1953; and

Whereas, the NCAA TV Plan for 1952 provided the television viewers of the nation with a major college football game every Saturday afternoon during the season while, at the same time, the one-appearance restriction and the geographic spread of games reduced, but by no means eliminated, the adverse effect of television upon attendance; and

Whereas, the public has also had opportunity to witness many games through the increasing use of delayed television, which has gained wide popularity, which holds great potentialities for the future of college football, and which should be encouraged and extended; and

Whereas, subscription television, which may become a reality in the not too distant future, will necessarily have an important bearing on the college football situation, and, if properly supervised, can be operated to football's advantage; and

Whereas, the NCAA must continuously seek to improve its television program so as best to reconcile the interests of the public in viewing college football on television with the interest of the colleges both in attendance and in preventing the monopolization of television by a handful of institutions; and

Whereas, it is the sense of the member institutions of the NCAA to continue to take the middle road between those institutions at one extreme who would ban television completely and those institutions at the other extreme who would,

by rejecting all action, permit the monopolization of television by the very few; and

Whereas, television is a national problem which can only be met by action on a national basis; and

Whereas, the NCAA fully recognizes the overriding importance of the colleges of the nation at all times being in full compliance with the laws of the land and, to that end, the NCAA has obtained the legal opinion of outstanding counsel and of law teachers that its actions have at all times been in full compliance with the laws of the land; and

Whereas, further partial or total clarification of the legal situation with respect to the televising of sports may be expected prior to the 1953 football season and any such clarification should be carefully considered and followed by the NCAA.

Now, Therefore, Be It Resolved that the members of the NCAA hereby agree that there shall be a television program for the 1953 football season to be directed by a Television Committee appointed by the Council of the NCAA and to follow the general spirit and purposes of this resolution as above expressed.

Be It Further Resolved that said Committee shall hold hearings at which all interested persons shall have full opportunity to be heard and to make proposals for the 1953 television program.

Be It Further Resolved that, as promptly as possible after such hearings, the Committee shall work out a plan to go into effect only if it is approved by mail referendum vote of two-thirds of those voting.

Be It Further Resolved that no member institution of the NCAA shall make any commitments, arrangements or contracts for the televising of college football games for the 1953 season until the adoption of the approved plan, and then only in conformity with the provisions of the approved plan.

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DEFENDANT'S EXHIBIT B-5

NCAA

television committee
report • 1954

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

I.
DEVELOPMENT OF NCAA TV PLAN FOR 1954

Continuing Problem

The television problem continued in 1954 to be a reality as far as college football was concerned. The National Collegiate Athletic Association continued during this twelve months to seek satisfactory solution of the problem through the means of a controlled TV program, designed to decrease materially the impact of television upon game attendance and thus to preserve intercollegiate football and its many recognized benefits.

The NCAA 1954 Television Committee—fifth of these bodies to be appointed by the Association for a one-year tenure—received assignment to devise a plan which would take all phases of the problem into account, and would achieve the most effective possible solution to it. The plan which was developed in consequence, and which was accepted and followed by the member colleges, was not put forward by the Committee as the final and definitive answer to all of the many vexing questions involved in the television of sports, and particularly of college sports. But the Committee did consider the 1954 Plan—in its conception and in its execution—the right palliative for television ills as they existed in 1954.

Research Findings

With the experiences of the 1953 football season still freshly in mind, the NCAA gathered in Cincinnati, Ohio, in January, 1954, for its annual Convention. Because consideration of television matters was an important feature of the meeting's agenda, the member college representatives were especially interested in the preliminary report submitted by the National Opinion Research Center. This announcement was the first indication by this agency of the results of its 1953

survey of TV's impact upon college football, the fifth annual investigation of this type undertaken by the NORC since its selection by joint action of the NCAA and the four television networks as the organization best qualified to study and measure the effects of football telecasts upon football game attendance and gate receipts.

Significant contents of the report were the following statements by the NORC's research directors: ". . . it had already been proved in previous seasons that the impact of television upon college football is severe and that TV competition is damaging to game attendance . . . The TV Committee nevertheless decided to engage the NORC to continue its investigations in 1953, because of the belief that it is desirable to have available for purposes of check and comparison accurate informative figures covering the entire period of the NCAA's supervision of football television. However, the major emphasis of the NORC was this year shifted away from research aimed at measuring the hurt from television toward the study of long-range effects of TV competition, patterns of attendance, and the like . . . We believe this is the first systematic study of what a national sample of football fans actually do and think during the course of a season . . . total college football ticket sales eased off an additional two percentage points during the 1953 season, to register a 9 per cent decline from the pre-television base years of 1947-48. This attendance decline undoubtedly resulted from the extension of television ownership to over 6½ million additional U.S. families, making a total of over 26 million sets outstanding, and from the availability of network TV programs (including the football game-of-the-week) in many new areas. If not for television, one would have expected football admissions to increase during 1953, for other factors were generally favorable . . . colleges without televised football competition reported a 9.3 per cent gain over their 1947-48 (pre-television) base year attendance, while colleges in TV areas reported an 18.4 per cent decline

from their pre-television levels. The 'TV differential' for 1953, therefore, amounted to 27.7 per cent, approximately one point higher than it was in 1952. This TV differential of 27.7 per cent represents the loss in ticket sales in 1953, attributable to televised football competition under the NCAA plan. It had previously been estimated by NORC that the differential under a policy of unlimited television would have been at least 40 per cent, and quite probably more, under existing widespread television set ownership. The attendance preserved by the restricted program of 1953 would thus appear to have been at least some 12 or 13 per cent of the total attendance in television areas."

With this substantiation of the convictions which they had gained from the experiences of their own colleges, the NCAA member institutions' delegates, assembled at the Cincinnati Convention, concluded that TV, though its damages had been somewhat lessened, was still an active threat to the welfare of intercollegiate football. They decided that, because the policy of television control had apparently succeeded in decreasing those damages, limitation of football telecasting was still the best means of protecting the college game's future. Accordingly, they voted, 172 to 9, to continue the control policy through 1954.

The NORC's final report for 1953, released on April 22, 1954, and distributed among the NCAA membership, confirmed the findings which had been brought to the attention of the Cincinnati Convention. Its basic theme, like that of the 1952 report was (1) that live telecasting of any college football games hurts attendance at most or many stadiums but (2) that this hurt is reduced considerably by the exercise of control over such televising.

Highlights among the points made by the NORC report for 1953 were the following:

1. "The adverse effects of television on college football attendance have been amply demonstrated in the four previous reports of this series."

2. "In 1950, the last year of uncontrolled television, the damage to attendance was almost as great with 9 million TV sets in operation as it was under controlled TV conditions with 26 million sets in operation last year."

3. "The 1953 figures can be summarized as follows: Given the current economic conditions, student enrollments, etc., college football attendance would have been 9 per cent above the 1947-48 levels, had it not been for TV competition. But where TV competition was present (which in 1953 was almost everywhere), attendance was almost 19 per cent below the 1947-48 levels. The difference of 27.7 per cent represents the harmful effects of television. It should be noted that the differentials reported in the last three years have occurred in spite of the NCAA's program of limited TV, a program which restricts the number of telecasts in any area to one per week, which prevents any one team from appearing on television more than once per season, and which apportions the limited number of telecasts available among teams from all parts of the country. There is no way of calculating precisely what the TV differential would now be under a policy of unlimited televising such as prevailed in 1950, but some hint can be obtained by a study of that year's experience. Nationally only 9 million TV sets were in operation that year, in contrast to the 26 million which had been sold by 1953. But among colleges in areas where TV ownership was already 'heavy' in 1950, the TV differential was 40 per cent. With most of the country now at the 'heavy' TV ownership level which was then characteristic of those areas, it is reasonable to assume that if the unlimited TV policy of 1950 were in effect today the national differential would be at the 40 per cent level instead of the 27.9 per cent which we actually find. Even such a calculation does not take into account the increased number of television stations, so that a fan who in 1950 had a choice of only one or two games on his local stations might now have a choice

of four or five in many areas. It is clear that the NCAA policy of limiting the amount of televised football has saved many colleges from losses which would force them to abandon the sport entirely."

4. "The 1953 research confirms the view that televised competition, when controlled as it has been during the last three seasons, has now exerted its maximum effect. If the present type of TV schedule is maintained, average attendance should hold relatively stable at the present levels, barring sharp changes in the economic situation. This does not mean, however, that the 27 per cent attendance loss to television will be soon regained, or that fans 'will return to their normal habits' now that they've enjoyed TV for a number of years, and start flocking back to the stadiums. That attendance is lost, and it will take many years of population and income growth to regain it."

5. "In the absence of television, college football, which attracted over 15 million paid admissions in 1947 and 1948, could have looked forward to a 10 per cent increase over those figures as a result of population and income gains. Such increases have actually been registered in areas outside the range of TV. But instead college football has to settle for attendance well below the 1947-48 base years—and even this reduced gate, only by assuming a continuance of some form of controlled TV."

6. There was no indication that the "novelty effect" of TV, hypothesized by some researchers in 1949, has worn off. This latest survey revealed exactly the opposite development. In 1953, 69 per cent of one-year set owners attended no games; 73 per cent of two-or-three year set owners attended no games; 84 per cent of four-or-more-year set owners attended no games. Thus persons for whom television is an old story have not "returned to their normal habits." "Actual findings are completely contrary to the 'novelty theory'."

7. Of the fans interviewed — all of whom claimed some interest in college football — only 20 per cent actually attended games during the 1953 season compared to 66 per cent who watched them on TV. And of those who attended, 60 per cent went to only one game, 20 per cent to two games, and 20 per cent to three or more games.

8. By far the large majority of fans, 62 per cent, confined their actual attendance to within a 100-mile radius of their home town. An additional 34 per cent attended only within their NCAA district, and only 6 per cent of the fans traveled to another NCAA district to see a game. This overwhelming concentraton of attendance within each fan's NCAA district indicated that regional telecasts might provide harmful direct competition to gate sales.

In its patterns-of-attendance studies, the NORC made the following discoveries as it sought through series of interviews with a sizeable sample of acknowledged football followers to determine just what it is that makes a fan tick:

1. Despite the keen desire of a football fan to see his *favorite* team in action, *local area* teams have even more appeal on the average than do *own college* teams; perhaps surprisingly, both these considerations are of greater importance to *most* fans than caliber of play.

2. Most attendance decisions are made early. (Thus preseason publicity is of greater value than week-of-the-game appeals.)

3. Eighty-five per cent of the country's population lacks the main incentives (affection and other ties) for attendance at *collegiate* athletics. (Non-collegians are therefore hard to convert into ardent devotees.)

4. It is difficult to make new fans among the adult public, most football followers developing their interest prior to age 21. (The fan of tomorrow must be intrigued in his younger years.)

5. In 1951 interviews showed that one fan in a hundred had gained his football interest through television; in 1953, following great TV expansions and intervening telecast of many exciting football games, one fan in a hundred indicated that he had gained his football interest through television. (Limitation of TV can check attendance losses, but athletic directors must look outside the medium for means of acquiring attendance gains.)

6. Though most football followers go less frequently to the stadium when televised football is available, TV's biggest casualty is the fan who used to attend one game a year but now attends none. (Many a fan in this category now indicates that he expects to watch televised football "almost every Saturday".)

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DEFENDANT'S EXHIBIT B-6

NCAA

television committee
report • 1955

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

I.
DEVELOPMENT OF N.C.A.A. TELEVISION PLAN FOR 1955

Chronic Problem

The year 1955 was similar to the years immediately preceding it in that it found the television problem still plaguing college football. The National Collegiate Athletic Association, continuing to recognize and respect this problem in its magnitude, continued also to recognize and accept responsibility for the achievement of an early and effective solution. As the means of accomplishing such end the Association continued to use a specific plan for the limitation and control of telecasts of intercollegiate football games; concurrently, it continued to seek improved methods for this supervisory operation, and new means of acquiring protection and providing promotion for football on the campus.

The 1955 NCAA Television Committee—sixth of these agencies to be appointed by the Association for a one-year term—received an assignment to compose a plan which would take all elements of the television problem into account, and would attain as complete a solution to it as possible. The plan which was devised in consequence, and which was accepted and followed by the member colleges, did not allow the Association to stand pat on its 1954 setup, despite the fact that the arrangements in that year had produced satisfactory results and had gained wide public acceptance. Instead this 1955 Plan introduced innovations intended to better the whole operation. The Committee did not construe the resultant system of checks and balances as the ultimate answer to the many puzzling questions raised by television's entrenchment in the college sports program, but it did consider this Plan an effective means of meeting the particular over-all situation which presented itself in 1955.

Research Findings

The experiences of the 1954 football season were very much in mind as the NCAA assembled in New York City in January, 1955, for its annual Convention. As it had been each year since 1949, television was an important item on the meeting's agenda; and so the member college representatives were especially interested in the report there submitted by the National Opinion Research Center. This review and analysis embodied the results of this agency's 1954 survey of television's impact upon college football, the sixth annual investigation of this type undertaken by the NORC since its selection by joint action of the NCAA and the four television networks as the organization best qualified to study and measure the effects of football telecasts upon football game attendance and gate receipts.

Highlighting the contents of the report were the following statements by the NORC's research directors:

1. "The five previous reports in this series have documented the effects of television on college football attendance since the 1949 season: heavy attendance losses in 1950 under a policy of unlimited television in spite of a relatively small number of television sets; a slackening of the expected rate of loss in subsequent years, as a result of the NCAA program of limited television; and a general stabilizing of attendance trends at lower levels as television ownership approaches universality."

2. "The findings bring up to date our understanding of what has happened to football ticket sales during the television era."

3. "Reversing the downward trend of the past four years, college football ticket sales increased about a third of a million during the 1954 season to register a 2.5 per cent gain over 1953. This rise in attendance advanced total paid admissions in 1954

to an estimated 14,091,000 which was almost equal to the 1952 level but still 1,157,000 below the pre-television years of 1947-48."

4. "It should be noted that this small rise in attendance during the past year occurred despite a further increase of almost 6 million new television sets during 1954. As predicted in our previous reports, the maximum harm of limited television competition was probably reached in 1953, when practically every football fan already had ready access to a television set."

5. "It should be emphasized that the stabilization of attendance levels, and the slight upturn in 1954, have occurred under a limited television program, and that college football attendance—in spite of vast population and income gains—still remains well below the pre-television peaks. Given the same general kind of limited television programs in future years, the outlook is for continued stable attendance trends, rising upward if the economy continues to flourish. Were the present limited television program to be replaced by wide-open televising of major games, or by any other program which would substantially increase the number of top games available locally on television screens, all evidence indicates a further adverse effect on attendance levels generally."

With this verification of the convictions to which they had held because of the experiences of their own colleges, the NCAA member institutions' delegates, assembled at the New York City Convention, concluded once again that television, though its damage had been considerably lessened, was still definitely harmful to the welfare of inter-collegiate football. They decided that, because the policy of television control had seemingly succeeded in decreasing this hurt, limitation of football telecasting was still the best means of protecting the college game's future. Accordingly, they took action, with a strongly convincing voice vote, to continue the control policy through 1955.

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DEFENDANT'S EXHIBIT B-7

NCAA

television committee
report • 1956

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

I.
DEVELOPMENT OF N.C.A.A. TELEVISION PLAN FOR 1956

The Problem and Its Attack

The National Collegiate Athletic Association continued in 1956 to cope with the television problem which is chronic with college football. It continued to seek and move toward a final solution for this problem. To serve these purposes the Association continued to use a definitive plan for the limitation and control of telecasts of inter-collegiate football games.

The 1956 NCAA Television Committee—seventh of these agencies to be appointed by the Association for a one-year term—received an assignment to compose a plan which would take all elements of the television situation into account, and would resolve them as fully as possible. The plan which was devised in consequence, and which was accepted and followed by the member colleges, was patterned very closely after the well received format of 1955, with only a few modifications introduced to improve the over-all operation. The Committee viewed this plan as a satisfactory system of checks and balances with which to meet the needs of 1956 and on which to build for the future.

Research Findings

The experiences of the 1955 football season were very much to the fore as the NCAA gathered in Los Angeles in January, 1956, for its annual Convention. As it had been each year since 1949, television was an important item on the meeting's agenda; and accordingly the member college representatives gave particular attention to the report there submitted by the National Opinion Research Center. This review and analysis embodied the results of this agency's 1955 survey

of television's impact upon college football, the seventh annual investigation of this sort undertaken by the NORC since its selection by joint action of the NCAA and the four television networks as the organization best qualified to study and measure the effects of football telecasts upon football game attendance and gate receipts.

Prominent in the contents of the report were the following statements by the NORC's research directors:

"Continuing the modest gains begun a year ago, college football ticket sales during the 1955 season totaled almost a half million more than 1954, to register a gain of 3.3 per cent. This rise in attendance advanced total paid admissions during the past season to an estimated 14,556,000, which was just above the 1951 level but still almost 700,000 below the pre-television years of 1947-48."

"It should be noted that the modest rise in attendance during the past year occurred despite a further increase of 4 million new television sets during 1955. As predicted in our previous reports, the maximum harm of *limited television competition* was probably reached in 1953, when practically every football fan already had easy access to a television set."

"It should also be emphasized that the upturn in ticket sales in 1955 occurred under a limited television program, and that college football attendance—in spite of vast population and income gains—still remains below the pre-television peaks. Were the present limited television program to be replaced by wide-open televising of major games, or by any other program which would substantially increase the number of top games available locally on television screens, all evidence indicates a renewed adverse effect on attendance levels generally."

"There can be no reasonable doubt that telecast football games which provide fans with 'free 50-yard line seats' seriously affect ticket sales."

"The over-all findings for 1955 clearly confirm the 1950 experience that games facing no televised competition at all consistently have the highest ticket sales."

"Games played without any television competition are hurt the least, while games facing regional telecasts are hurt more than those played against non-regional telecasts. The 1955 attendance reports indicate that had it not been for the increase in regional telecasts, over-all gains in ticket sales would have been greater; and had it not been for the increase in 'black-out' situations, the over-all attendance gains would have been lower."

In light of these and their own observations and conclusions, the NCAA member institutions' assembled delegates concluded once again that television, despite its decreased damage, still threatened the welfare of intercollegiate football. They decided that, because the now long-established policy of television control had contributed materially to the lessening of possible hurt, limitation of football telecasting was still the best means of protecting the college game's future. Therefore, they took action extending the control policy through 1956.

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DEFENDANT'S EXHIBIT B-8

NCAA

television committee
report • 1957

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

I. DEVELOPMENT OF 1957 N.C.A.A. TELEVISION PLAN

The Problem and Its Disposition

The National Collegiate Athletic Association continued in 1957 to deal successfully with the television problem which is—and according to all signs will be in the future—chronic with college football. It continued, nevertheless, to strive diligently for a final solution to this problem. In these connections the Association continued to use a well delineated plan for the limitation and control of the telecasts of intercollegiate football games.

The 1957 NCAA Television Committee—eighth of these agencies to be appointed by the Association for a one-year term—was charged with the responsibility of designing a plan which would take all features of the television situation into account, and would make provision for each of them as fully as possible. The plan which resulted, and which was accepted and followed by the members colleges, was modeled very closely upon the well-received 1956 arrangement, with only a few adjustments undertaken to increase its over-all effectiveness. The Committee judged this plan to be a satisfactory apparatus, embodying checks and balances with which to meet the requirements of 1957 and with which to prepare for the future.

Research Findings

Attending delegates were mindful of the experiences of recent football seasons as the NCAA gathered in St. Louis in January, 1957, for its annual Convention. Television occupied its usual important place on the meeting's agenda; and accordingly the member college representatives gave particular attention to the report submitted by the National Opinion Research Center. This review and analysis reflected the results of this

agency's 1956 survey of television's impact upon college football, the eighth annual investigation of this sort undertaken by the NORC since its selection in 1950 by joint action of the NCAA and the then four television networks as the organization best qualified to study and measure the effects of football telecasts upon football game attendance and gate receipts.

Salient in the contents of the report were the following statements by the NORC's research directors, who in determining their findings made use of attendance figures compiled by the National Collegiate Athletic Bureau, the NCAA's statistical and publishing branch:

"Paid attendance at college football games scored an additional gain of almost 5 per cent during the past season on its steady climb back to the pre-television levels of 1947-48. Over a half million additional tickets were sold during 1956 to push paid admissions over the 15 million mark for the first time since 1950. Total attendance is now within 2 per cent of the 1947-48 average.

"This recouping of attendance losses bears out the predictions made in Reports No. 6 and No. 7. As the basic underlying factors of student enrollment and national income maintain their recordbreaking rate of growth and the type of limited television competition remains the same, it is to be expected that football ticket sales will also soon establish new records.

"This does not mean that the harmful effects of even limited television competition have been finally eliminated. It does suggest that they are being neutralized by the upward pressures of a prosperous and growing economy. During the past year, student enrollment at NCAA football-playing colleges advanced an additional 6 per cent to surpass the 1947-48 level. The student body at large colleges is now only one per cent below pre-television enrollment while small colleges are already more than 7 per cent above pre-television years.

Furthermore, disposable personal income, which is closely related to all consumer spending, expanded about 5 per cent during the past year and is now almost 60 per cent greater than in the 1947-48 base years. Consequently, if there were no harmful effects of television competition, total ticket sales could be expected to be well above the pre-television years. Actually, as we see, they are only just approaching those levels.

"It should also be remembered that this delayed revival of paid admissions is occurring under limited television competition. Were the present NCAA program to be replaced by wide open televising of top local games, all evidence indicates a renewed and substantial adverse effect on attendance.

"While there is no way of calculating precisely what the television effect would now be under a policy of unlimited televising such as prevailed in 1950, some hint can be obtained by a closer look at that year's experience. Nationally, only 9 million television sets were in use that year, in contrast with over 36 million in 1956. In 1950, most colleges in television areas faced a situation in which only one family in three owned a television set; today television sets are found in an average of three out of four homes. In 1950, only a few of the television areas could be considered 'heavily saturated,' while today practically all television areas report set ownership among more than half the families.

"If we look, however, at the 1950 experience of colleges in areas where television ownership was already 'heavy,' we find that their television differential was at the level of 40 per cent, instead of the 28 per cent we found nationally in 1953—when all areas were heavily saturated, but the televising of games was strictly limited. It is reasonable to assume that if the same televising conditions prevailed as in 1950, the current 'heavy saturation' of television ownership would produce this same 40 per cent attendance differential attributable to television. But even this calculation does not take into account the increased number of television stations, so that a fan who in 1950 had a

choice of only one or two games on his local stations now would have a choice of four or five in many areas."

"This report concludes 10 years of football attendance analysis. By next year, if student enrollment and national income continue to grow, over-all attendance should exceed the 15,250,000 recorded in 1947-48. It will then be advisable to shift the base years from 1947-48 to a more recent period. During the past ten years, some colleges have de-emphasized their football programs, while others have built new stadia and increased their emphasis on football competition. These long-term changes tend to distort comparisons of attendance in recent years with average attendance during a distant base period. It is fortunate, therefore, that changes from the pre-television base years will be of reduced interest and that a more recent base period can be established for future analyses."

In light of these and their own observations and conclusions, the NCAA member institutions' assembled delegates decided once again that television, despite its decreasing damage, still threatened the well-being of intercollegiate football. They concluded that, because the now well-established policy of television control had contributed appreciably to the lessening of possible hurt, limitation of football telecasting was the only practicable and available means of protecting the college game's future. Therefore, they took the steps necessary to extend the control policy through 1957.

* * *

PLAINTIFFS' EXHIBIT 2

Official Interpretation

Adopted by the NCAA Council April 17, 1981

"The Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season as defined in O.I. 307. The terms or principles of the control shall be set forth in a television plan or program which periodically shall be prepared by the Football Television Committee, approved by the NCAA Council for submission to the membership by a mail referendum and approved by at least two-thirds of the members voting in such referendum, a procedure which has been followed by the NCAA membership on a regular basis for approximately 30 years. Any commitment by a member institution with respect to the televising or cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season. [B11-3-(aa)]."

PLAINTIFFS' EXHIBIT 84

The National Collegiate Athletic Asociation

President
JAMES FRANK
Lincoln University
Jefferson City, Missouri 65101

Executive Director
WALTER BYERS

Secretary-Treasurer
JOHN L. TONER
University of Connecticut
Storrs, Connecticut 06268

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Michigan State University
DONALD M. RUSSELL
Wesleyan University
P. LAVERNE SWEAT
Hampton Institute
KENNETH J. WEITER
Central College (Iowa)

April 17, 1981

Mr. James Frank, President
National Collegiate Athletic
Association
Lincoln University
Jefferson City, Missouri 65101

Dear President Frank:

This is a request on behalf of the NCAA Football Television Committee for authorization from the NCAA Council to seek approval from the NCAA membership for the committee to negotiate with interested buyers for sale of television rights to college football games for the 1982 and 1983 seasons (and possibly one or two years beyond) on the basis of the principles set forth below.

As was the case in 1977, the television committee recommends that the membership be asked through a mail referendum procedure to act upon a set of controlling principles by which the committee will be guided in consummating the sale of rights.

Considering the necessary complexities of the television program and the everchanging conditions of the television industry, the committee is convinced it must maintain reasonable flexibility if it is to achieve the objectives established by these principles. The implementing details of the principles will be established during resultant negotiations.

1981 EXECUTIVE COMMITTEE
PRESIDENT
SECRETARY-TREASURER
ERNEST C. CASALE
Temple University
LINDA K. ESTES
University of New Mexico
J. WILLIAM GRICE
Case Western Reserve University
ROBER C. JAMES
Atlantic Coal Conference
HENRY T. LOWE
University of Missouri, Columbia
SEAVER PETERS
Dartmouth College
ROBERT T. RIEDEL
State University College, Geneseo
CHARITY SCOTT
University of Alabama
JOE L. SINGLETON
University of California, Davis
MARY ZIMMERMAN
University of South Dakota

With the distribution of cable television signals by satellite and, more recently, the development of a growing number of pay television stations, many options are presented for the consideration of college football interests. During the past several months, the NCAA Football Television Committee has intensified its acquisition and study of data about the NCAA series, compiled extensive information concerning developments in the television industry, met with representatives of Divisions I-A and I-AA football-playing conferences to solicit their suggestions and met with representatives of most of the nation's major communications companies. Significant information also was obtained from a survey of the NCAA membership. The highlights of the responses were printed in the March 31, 1981, issue of the NCAA News.

Based upon the information gathered as indicated above and its observation of the series over the past several years, the committee has concluded that the series of Saturday afternoon telecasts should be presented on two national networks. It believes the additional promotion of college football and competition between two networks in all aspects of presentation of the series will be beneficial to college football. It also is interested in taking advantage of opportunities provided by new forms of television, and contemplates utilizing such delivery systems through specialized supplementary programming, probably on Saturday evenings.

An unusual element has been injected into the committee's preparation for the sale of future football television rights. The College Football Association, an allied member of the NCAA, each member of which is an active member of the NCAA, appointed a Television Study Committee which has drafted a television plan similar in structure to that of the NCAA, but markedly different insofar as its purposes, appearance limitations and financial formulas are concerned. Additionally, the CFA Board of Directors, before being aware of the principles finally recommended by this committee, requested CFA member institutions to abstain from voting on the NCAA principles on the premise that those institutions thereby would reserve their football television rights and subsequently be able to operate their own football television program independent of the NCAA's.

The principles developed by the NCAA Football Television Committee envision an ambitious program of football television while at the same time limiting the potential damage to in-stadium attendance which could result from television release of an excessive number of any one institution's games. This recommended program will accommodate: two networks plus a third experimental series for pay television and/or cable television; potentially 140 annual national network appearance opportunities compared to the current 116; five appearances per

institution in two years on the two networks (plus possibly a sixth when playing on a "free" date), and increased appearance opportunities for Divisions I-AA, II and III.

The NCAA Football Television Committee has examined at length the CFA plan and does not believe it serves a useful purpose in behalf of the overall interests of college football. Some of its features, in fact, seem to contradict the expressed interests of the NCAA membership in responses to the NCAA survey previously mentioned.

Accordingly, the committee *unanimously recommends* to the membership the following principles which shall constitute the policy and program for the football television activities of member institutions during the 1982 and 1983 college football seasons (and possibly 1984 and 1985):

Principles

1. The purposes of the program and any detailed plan or agreements devised thereunder shall be to reduce insofar as possible the adverse effects of television in its various forms upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television; to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.
2. The NCAA shall control all forms of live and delayed television (including cable transmission) of intercollegiate football games of NCAA member institutions during the fall season as defined in Official Interpretation 307 (the traditional fall football season). The terms of such control in 1982 and 1983 shall be from September 1 through the

second Saturday in December each year. It shall be exercised by the NCAA Football Television Committee subject to these principles and subject to approval of the 1982-1983 Football Television Plan (which shall contain the implementing details) by at least a two-thirds majority of the NCAA Council present and voting.

The television committee also shall have authority to control television and award such rights for an additional one- or two-year period if this is deemed necessary or desirable in the interests of the program, but it first must obtain approval of the NCAA Council and such approval shall be subject to at least a two-thirds majority of those Council members present and voting.

3. The NCAA Football Television Committee shall award to two national networks (or other qualified organizations) appropriate rights for the live telecasting of college football during the indicated periods of control consistent with Principles 1 and 2 above. It also intends to initiate a supplementary series of live presentations of college football games via such media as cable television and/or pay over-the-air television and award appropriate rights therefor subject to such terms and conditions as the television committee shall determine are appropriate.

4. Contracts for all rights awarded pursuant to Principles 2 and 3 shall be signed for the NCAA by the Association's executive director after approval by the Football Television Committee and the NCAA Council. Such rights contracts in each instance shall specify the guaranteed aggregate compensation to be paid by each buyer of rights to the participating colleges for the games telecast (or cablecast) each season, and shall provide that each party awarded a rights contract shall contract individually and directly with member colleges for television rights and appearances under such terms and conditions and for such compensation as may be agreed upon, consistent with and

subject to the provisions of the 1982-1983 Football Television Plan to be adopted as herein set forth. The right to contract with respect to certain games may be apportioned between or among the buyers of rights if found to be necessary or desirable.

5. No member institution may make any arrangements for any form of live or delayed football television during each of the regular football seasons covered by these principles which are not in accordance with these provisions and the terms of the NCAA Football Television Plan as finally approved by the NCAA Council under Principle 2, and without the prior consent of its opponent institution.

   Any commitment by a member institution with respect to the televising of its football games in future seasons shall be subject to the terms of the NCAA Football Television Plan as shall be applicable to such seasons, regardless of whether such plan has been adopted at the time any such commitment is made.

6. The NCAA shall offer for sponsored national network telecasting Saturday afternoons during each of the fall football seasons covered by these provisions two principal series of college football programs, and the network carrying each series shall provide complete live coverage throughout the United States on each series date each year. National and regional telecasts shall be required in ratios determined by the NCAA Football Television Committee.

7. A goal of the television committee shall be to maximize team appearance opportunities. During each fall season, each national network shall be required to present a specified number of "exposures" (i.e., the release on a single date of a live game telecast into each television market on the basis of national distribution) of NCAA football. Carriers of any supplementary series will be required to meet similar criteria.

The following analysis of team appearance opportunities may be projected. Based on 12 to 14 exposures for each of two national networks, each Saturday afternoon series would present each season a minimum of 60 to 70 (120 to 140 counting both networks compared to the present plan's 116) team appearances. A team appearance is one team's participation in one televised game. [The 70 team appearances, for example, would be achieved by presentation on one network of seven national exposures (one game per exposure) and seven regional exposures with three to six games per exposure.]

8. The telecast of a series game shall not be blacked out in the area in which the game is played.

9. The new football television plan shall contain standards of presentation controlling the commercial format and commercial sponsors participating in the series. It shall restrict the available commercial time to 22½ minutes per telecast in no more than 21 positions, station breaks to two per telecast and the time granted the carrying network for promotional announcements. It shall be required that college football telecasts on the national networks, or as a part of the supplemental series, shall include time reserved for the participating institutions and higher education in general, consistent with the procedures followed in 1980 and 1981.

10. The following institutional appearance opportunities shall be utilized for the two national network series for the 1982 and 1983 seasons: An institution shall be limited in the two-year period to two national appearances and three regional appearances, with not more than one national and not more than a total of three appearances to occur in one year on the two series. In addition, depending upon the number of exposures finally negotiated, each carrying network on one occasion each year possibly could use one

of the dates listed in Article 14 of the 1978-1981 Football Television Plan for a "free appearance" presentation, which could be either a national or a regional appearance but not more than an institution's third appearance in a given year. No team could benefit from such a "free" appearance, if authorized, more than once during the two-year period. Appearance opportunities may be apportioned between the two national networks if this is found to be necessary or desirable.

Appropriate appearance opportunities for the supplementary series shall be determined by the committee subsequent to the conclusion of negotiations for the national network series. It is anticipated that at a maximum the appearance rule cited in the preceding paragraph would apply to the supplementary series in combination with the national series; however, the appearance rule for the supplementary series may be more limited.

11. No member of Division I-A football shall be guaranteed any appearance on the different series. Based upon the maximum team appearance opportunities described in Principle 7, each allied football-playing conference (5) of Division I-AA Football shall be guaranteed a minimum of two appearances on the national series during the two-year period of the plan and, based upon the current division membership, Division I-AA Football members shall be guaranteed 12 such appearances during the two-year period of the plan, with the 10 appearances guaranteed to the Division I-AA conferences to count against this minimum.

12. Television opportunity for Divisions II and III member institutions shall be required. At a minimum, the regular-season telecasts would be three for Division II and two for Division III on each national network series per year. NCAA Divisions I-AA, II and III Football Championship games would be televised as provided in the present plan.

13. The 1978-1981 Football Television Plan sets forth regulations pertaining to telecasting dates for the series and the series format (Articles Five and Six); exception telecasts and cablecasts for Divisions I, II and III games (Articles 16 and 17); educational television, closed circuit television and delayed telecasts or cablecasts (Articles 18, 19 and 21); mandatory supporting programs (Article 22); members' rights (Article 24); assessment upon receipts (Article 25), and other matters pertinent to the administration of the national football television series. Provisions similar to those of the 1978-1981 plan governing these items shall be a part of the 1982-1983 plan.
14. The new plan will contain an Article 16 governing exception telecasts by Division I members which reflects the current conditions of the television industry and which provides equitable opportunity for all electronic media to obtain rights to present exception telecasts on those occasions when no "appreciable damage" will be done to gate attendance at any concurrently played game (see Article 16 of the 1978-1981 NCAA Football Television Plan for definition).
15. The Football Television Committee shall report the results of its negotiations under the terms of the principles stated herein to the NCAA Council and any resulting contracts shall not become binding upon the NCAA and its member institutions until approved by the NCAA Council by a favorable vote of at least two-thirds of the members present and voting; furthermore, after such ratification has been obtained, the full details of the NCAA Football Television Plan for 1982-1983 (and 1984-1985, if authorized), as fully approved by the NCAA Council, shall be forthwith distributed to all members of the Association.

The NCAA Football Television Committee is unanimous in strongly supporting these recommendations and believes they fairly balance the competing interests recognized in Principle 1. We urge the membership's approval of these controlling principles.

Sincerely,

/s/ Wiles Hallock
FOR THE NCAA FOOTBALL TELEVISION COMMITTEE
WILES HALLOCK, Chair, Pacific-10 Conference District 8
District 1 Robert A. Seiple, Brown University and Frank B. Ryan, Yale University (Mr. Ryan succeeds Mr. Seiple 9-1-81 and participated without vote)
District 2 John Crouthamel, Syracuse University
District 3 Carl Maddox, Mississippi State University
District 4 Cecil N. Coleman, Midwestern City Conference and Hugh D. Hindman, Ohio State University (Mr. Hindman succeeds Mr. Coleman 9-1-81 and participated without vote)
District 5 Edwin B. Crowder, University of Colorado
District 6 Marvin Tate, Texas A&M University
District 7 Joseph L. Kearney, Western Athletic Conference
At-Large Judith R. Holland, University of California, Los Angeles
At-Large Phyllis Howlett, University of Kansas
At-Large Walter Byers, NCAA
I-AA Andrew T. Mooradian, University of New Hampshire
II Bob Moorman, Central Intercollegiate Athletic Association
III Ronald Schipper, Central College (Iowa)

PLAINTIFFS' EXHIBIT 70

The National Collegiate Athletic Association

President
JAMES FRANK
Lincoln University
Jefferson City, Missouri 65101

Executive Director
WALTER BYERS

Secretary-Treasurer
JOHN L. TONER
University of Connecticut
Storrs, Connecticut 06268

April 21, 1981

Chief Executive Officers
Voting Member Institutions and Conferences of
The National Collegiate Athletic Association

Ladies and Gentlemen:

The 1978-1981 NCAA Football Television Plan expires after the 1981 season and it is in the best interests of the Association's football playing members that arrangements for future television of college football be concluded in the near future.

To that end, the NCAA Football Television Committee, in keeping with its assignment under Bylaw 11-3-(aa), has requested the officers to conduct a referendum of the membership to seek approval of the principles and program it has developed under which it would conduct the sale of future football television rights. Any agreement reached with any communications company through this process would be subject to ratification by a two-thirds vote of the NCAA Council before it would become binding upon the members of this Association.

The Council has authorized the officers to conduct such a referendum consistent with the procedures followed by the Association for the past 30 years or so.

Preparatory to offering its recommendations to the NCAA membership, the Football Television Committee obtained the opinions of the membership about the current television program through a survey conducted in January, met with representatives of a number of football-playing allied NCAA mem-

bers February 4-6 and met with representatives of leading television communications and cablecasting companies February 25-26. It believes, therefore, its recommendations are based on the most current information available concerning the attitudes of member institutions, developments in electronic communications and the current value of sports events on television and cable.

Each eligible member institution is receiving, in this mailing, a ballot form to be employed in casting its vote on the recommendations described in the enclosed letter dated April 17, 1981, from the Football Television Committee. Inasmuch as the certification of an institution's voting delegate under NCAA procedures is the responsibility of the chief executive officer, the ballot is being sent to the president or comparable officer of each voting member. Copies of these materials (except ballot) are being sent to each faculty representative and director of athletics.

To be counted, the completed ballot must be received at the NCAA national office either by mail or wired transmission no later than May 8, 1981, subject to the exception printed on the ballot. For adoption, the recommended principles and program must be supported by at least two-thirds of the votes cast in the referendum.

The NCAA Football Television Plan has served the football-playing membership well by adhering to the interrelated objectives of (i) protecting attendance income, (ii) providing reasonable distribution of television appearance opportunities and (iii) producing substantial television income. Admittedly these are competing goals, particularly since 98.6 percent of the 2,417 games (1980 figures) conducted annually by NCAA members are played Saturday, with 75.4 percent (1,823 games) played on Saturday afternoon.

As noted in Mr. Hallock's accompanying letter, the College Football Association's Board of Directors advised its members

to abstain from this referendum on the premise that by so doing those colleges will be reserving their football television rights. This CFA notice, incidentally, was issued before the NCAA television committee had adopted a plan for recommendation to the membership. The NCAA Council (after consulting with legal counsel) can identify no valid premise for such a course of action in light of the history of the NCAA's control of football telecasting since 1951. It believes CFA members would be ill-advised to forego their voting privileges by abstaining.

Abandonment of football television controls, or a splintering of the current program into several competitive programs, surely would be destructive of one or more of the purposes to be achieved by the NCAA program and would be detrimental to all football-playing members. For that reason, the Council urges membership support of the proposals of the Football Television Committee.

Cordially yours,

/s/
James Frank
President

JF:nlm

Enclosures

cc: Faculty Athletic Representatives
Directors of Athletics

PLAINTIFFS' EXHIBIT 71

The National Collegiate Athletic Association

President
JAMES FRANK
Lincoln University
Jefferson City, Missouri 65101

Executive Director
WALTER BYERS

Secretary-Treasurer
JOHN L. TONER
University of Connecticut
Storrs, Connecticut 06268

June 23, 1981

Chief Executive Officers
Voting Member Institutions and Conferences of
The National Collegiate Athletic Association

Ladies and Gentlemen:

Approximately two months ago, at the request of the NCAA Football Television Committee, the Association's Council undertook a mail referendum of the membership on the recommended NCAA football television policy and program for 1982 and 1983. These recommendations were approved as reported in the NCAA News of May 15, 1981. The recommended policies and principles are in full force and effect.

In NCAA President Frank's letter to you at that time (April 21, 1981), it was noted that the College Football Association had urged its 62 institutional members to abstain with notice from the referendum. As a result of questions raised because of the CFA's appeal, the members of the CFA were advised that under the official interpretation of Bylaw 11-3-(aa) duly adopted by the Council on April 17, 1981, any commitment by a member to televise or cablecast its football games in future seasons would be subject to the terms of the NCAA Football Television Plan approved by the members for such seasons. Those members were urged to follow NCAA procedures if they desired changes in the NCAA plan.

The College Football Association, June 7, 1981, adopted a resolution rejecting NCAA television legislation. Although one

of the stated purposes of the CFA is to operate within the structure of the NCAA, the resolution rejected the validity of the above-mentioned official interpretation and authorized the development of a detailed CFA football television plan for consideration by its members. It would seem that some major football institutions within the CFA wish to defy NCAA legislation because of the possibility of increasing their monetary rewards, even though their actions may be injurious to the overwhelming majority of other affected institutions, and even though such actions will be incompatible with their continued good standing as members of the NCAA.

The CFA legalistic arguments to justify this course of action, in our view, have little merit. These arguments demonstrate a lack of understanding of the legislation of the NCAA and the law of voluntary associations, and they reflect confusion between the reservation of property rights and control over the exercise of those rights accomplished by the NCAA Football Television Plan. Beyond that, it appears clear that the NCAA cannot endure as an effective organization controlling intercollegiate athletics if some members are free on their own impulse to determine which rules they will observe and which they will not. There seems to be little difference between the right to televise football independently of an NCAA-approved plan and the right to pay money to student-athletes, or the right to determine the size of a coaching staff or the number of football grant-in-aid recipients. If a member objects to any of those regulations, it has a right to have its objections considered at a Convention which will determine the will of the membership. That member has an obligation to follow established NCAA procedures to resolve such issues to the satisfaction of, and for the benefit of, the membership as a whole.

Members of the CFA brought nothing before the 1981 NCAA Convention concerning the televising of football, whereby its concerns in that regard could have been considered by the members; instead, the CFA waited until after that Convention

to raise for the first time an alleged "property right" to televise football which places it beyond NCAA regulation for future years.

The Council interpretation, based on Bylaw 11-3-(aa) and the 30-year history of NCAA regulation of football television, and specifically authorized by Constitution 6-2, is a complete response to the CFA assertion with respect to the right to televise in future years. CFA members or others will have a right to challenge that interpretation at the January 1982 NCAA Convention and still would have ample time to arrange for the televising of their games for 1982 if the interpretation is not sustained by the NCAA membership. Nevertheless, the CFA seems to reject that established NCAA procedure and has elected instead to declare an official NCAA interpretation to be invalid and presumably to proceed with its own television plan. Far from operating within the structure of the NCAA, the CFA actions seem directed toward reserving to certain CFA members the right to determine national football television policy and disregarding the interests of other football-playing members of the NCAA.

If the CFA is not successful in defeating the official interpretation at the 1982 NCAA Convention and thus preventing the NCAA plan from applying to all NCAA members, then certainly CFA members which ignore or have ignored the interpretation will be subject to the enforcement procedure of the NCAA and its several penalties for violation of the conditions and obligations of membership (Article 4, Section 2, NCAA constitution). CFA actions which might lead to such a conclusion are not ones designed to operate within the NCAA structure.

There is a continuing undertone in the CFA leadership's commentary that only those institutions which are major TV participants should determine national television policies, thus ignoring the equities of a vast number of NCAA members (including a great many in Division I-A) which conduct varsity

football games on Saturday afternoons and evenings. It seems a conscious effort has been mounted to take the decision-making process away from the NCAA membership and its annual Convention by a deliberate attempt to invalidate the approved NCAA Football Television Plan between Conventions.

The NCAA Council, at a meeting June 12, 1981, considered the June 7 CFA decision; reaffirmed its interpretation of Bylaw 11-3-(aa) as circularized to CFA chief executive officers April 18, 1981, and printed in the NCAA News of April 30, 1981, and authorized this communication. The interpretation is reprocuced below for convenience of reference.

THE NCAA COUNCIL

/s/ James Frank
By: James Frank
President and Chair

JF:lls

cc: Faculty Representatives
Directors of Athletics
—Voting Member Institutions

Official Interpretation

Adopted by the NCAA Council April 17, 1981

"The Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season as defined in O.I. 307. The terms of principles of the control shall be set forth in a television plan or program which periodically shall be prepared by the Football Television Committee, approved by the NCAA Council for submission to the membership by a mail referendum and approved by at least two-thirds of the members voting in such referendum, a procedure which has been followed by the NCAA membership on a regular basis for approximately 30 years. Any commitment by a member institution with respect to the televising of cablecasting of its football games in future seasons necessarily would be subject to the terms of the NCAA Football Television Plan applicable to such season. [B11-3-(aa)]."

PLAINTIFFS' EXHIBIT 80

In its August 12-14, 1981, meeting, the NCAA Council adopted the following resolution:

> Whereas, it is clear that a commitment to act contrary to the 1982-1985 NCAA television plan and program constitutes a violation of the conditions and obligations of membership set forth in Constitution 4-2-(a);
>
> Be It Resolved, that the Association's enforcement department is directed to issue official inquiries under the Association's official enforcement procedures to institutions which make, or are reported to have made, such commitments and to proceed promptly with the processing of such cases.

PLAINTIFFS' EXHIBIT 54

The National Collegiate Athletic Association

President
JAMES FRANK
Lincoln University
Jefferson City, Missouri 65101

Executive Director
WALTER BYERS

Secretary-Treasurer
JOHN L. TONER
University of Connecticut
Storrs, Connecticut 06268

MEMORANDUM

August 17, 1981

TO: Members of the Divisions I, II and III Steering Committees.

SUBJECT: Enforcement of 1982-1985 NCAA Football Television Principles and Program.

During the division steering committee meetings in Houston June 11-12, questions were raised as to the enforcement procedures which apply to the NCAA football television plan. This matter was reviewed again by the NCAA Council at its meeting of August 12-14, at which time the Council affirmed the position it previously had taken; specifically:

1. Article 4, Section 2, of the NCAA Constitution (page 26) states:

   "Section 2. *Conditions and Obligations of Membership.* The members of this Association agree:

   (a) To administer their athletic programs in accordance with the constitution, the bylaws and other legislation of the Association;"

   The language "other legislation of the Association" includes the NCAA football television policy and program for 1982-1985, as officially adopted by the Association's membership.

National Office: Nall Avenue at 63rd Street • Mission, Kansas
Mailing Address: P.O. Box 1906 • Shawnee Mission, Kansas 66222 • Telephone 913/384-3220

2. A commitment by a member institution to televise or cablecast its football games in violation of the 1982-1985 NCAA football principles and program would constitute a violation of Article 4, Section 2-(a) of the constitution at the point that such a commitment is made.

   As a member of the Association, an institution agrees to administer its athletic program in accordance with the legislation of the NCAA and a commitment to violate said legislation represents an agreement not to administer its athletic program in accordance with such legislation.

3. Reports of such a commitment will be handled through the regular enforcement procedures of the Association; i.e., an official inquiry will be sent to the chief executive officer of such an institution. The inquiry will be expedited since a deliberate institutional decision to violate the conditions and obligations of membership traditionally has been considered the most serious kind of violation.

If you need any further information in this connection, please let me know.

WALTER BYERS

WB:lls

PLAINTIFFS' EXHIBIT 122

SATURDAY OKLAHOMAN & TIMES

Sports

SATURDAY, AUGUST 15, 1981

29

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PLAINTIFF'S EXHIBIT 122

NCAA Council Approves Action Against NBC 'Teams'

By Jerry McConnell
Sports Editor

The NCAA Council has approved a recommendation that enforcement proceedings should be started against members of the College Football Association that commit themselves to participate in a proposed television contract with NBC.

The CFA will meet in Atlanta, Ga., next Friday to decide whether to ratify the four-year, $180 million contract with NBC. If the CFA approves the contract by a majority vote, the members will still have a certain period (the deadline was originally set for September 10) to decide whether to participate in the plan.

The NCAA administration and its attorneys had recommended that enforcement proceedings be started at the latter date, and the Council placed its stamp of approval on that position at a week-long meeting concluded Friday in Gleneden Beach, Ore.

"The Council reviewed those recommendations and agreed that it was the proper interpretation and that it would be the proper procedure," said Tom Hansen, an assistant executive director of the NCAA and administrator of its TV programs.

Hansen said the Council also instructed that the infraction proceedings should be handled "expeditiously."

The 22-member Council, which includes three CFA members, is the ruling body of the NCAA.

Hansen said the Council also discussed a request from the CFA for documents on the NCAA's own television plan, and that the Council agreed to make available complete information on the plan.

Ten days before the CFA officials announced the NBC plan, the NCAA had reached an agreement with ABC and CBS for a four-year, $263.5 million TV package covering the 1982-85 seasons, the same season covered by the CFA plan.

Hansen said the Council also agreed to send the chairman of its TV committee, Wiles Hallock of the Pacific 10 Conference, to Atlanta to attend the CFA meeting, if requested.

It was understood that the CFA had made such a request, but Hansen said there seemed to be some question as to whether it was a "formal" request.

The NCAA contends that a tieup between NBC and the CFA would be a violation of its own plan, and thus make the CFA schools involved subject to penalties. The 61 members of the CFA, which includes Oklahoma and Oklahoma State, are also members of the NCAA.

The NCAA has never said specifically what the possible penalties would be, but Hansen had said earlier that the schools could be placed on probation, and barred from appearing on television or participating in other NCAA events, such as the NCAA basketball tournament.

No one has said what would happen if a

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NCAA Panel OKs Action In TV Case

From Page 29

school played on TV in violation of that prohibition, but some observers think that at that point the NCAA would have no recourse other than to recommend that the school be expelled, which would require a two-thirds vote of the entire membership.

Hansen said that any alleged violation of the NCAA plan would be turned over to its infractions committee, which would then handle the investigation in a normal manner.

"In this case, I wouldn't think it would take a great deal of work to discover whether or not they had violated our rule," Hansen said.

The CFA maintains that such a TV program would not be a violation of the NCAA rules, that the schools retain "the property rights" to television revenue of their own games, and they can not legally be deprived of that right unless they agree to turn it over to an agent, a roll the NCAA has handled since 1952.

There has been considerable speculation about what would happen to the NCAA pact with ABC and CBS if a considerable number of CFA members choose the NBC pact.

One official at CBS said Friday that if a large number of the major schools in the CFA go for the NBC package, the other networks would probably use an escape clause and bow out of the NCAA pact.

"There wouldn't be enough advertiser support for two packages," said Kevin O'Malley. "We don't see a way that two large packages could be supported."

Hansen said, however, that such speculation had to be based on conjecture, adding, "I don't think enough (CFA schools) are going to defect for that decision to have to be made. I think there is a growing feeling among CFA schools that it would not be appropriate to attempt to destroy the NCAA program and start a new program."

News media members who have been attempting to poll CFA schools report they have been getting a lot of cautious "undecided" responses. OU president Bill Banowsky has not made public how he will vote, and one source said he may wish to consult further with the school's regents on the matter.

Dr. Lawrence Boger, president of OSU, said Friday that he has just received a copy of the NBC contract, and that school officials have not yet decided how

THE DAILY OKLAHOMAN Sports

FRIDAY, AUGUST 28, 1981 • • 27

PLAINTIFF'S EXHIBIT 123

CFA Teams Could Be Bowl-Banned

By Jerry McConnell
Sports Editor

The chairman of the NCAA Committee on Infractions says the minimum penalty for College Football Association members that commit to a television contract with NBC would include a prohibition against bowl appearances.

Charles Alan Wright, a law professor at the University of Texas, said last week a CFA-NBC tieup would leave the NCAA with little choice but to impose severe sanctions on participating CFA members, including "... at a minimum — barring all their athletic programs from participating in NCAA-sponsored events." That means participating in championship events in other sports, such as gymnastics, basketball, track, golf and swimming.

Dr. Wright told The Oklahoman that the prohibition would also include participation in NCAA-approved events such as bowl games.

"It applies to any events sponsored or certified by the NCAA," Wright said. "The bowls are all certified by the NCAA."

Wright said these have been the usual penalties for violation of the "conditions and obligations of membership" in the NCAA. The NCAA says a TV tieup between the CFA and NBC would be such a violation.

The CFA insists that it would not be such a violation, arguing that the NCAA constitution does not give the NCAA authority over the "property rights" to TV revenue.

The 61 CFA schools have until Sept. 10 to decide whether they will participate in a four-year, $180 million contract with NBC that guarantees each school at least two TV appearances in four years and a minimum of $1 million for those appearances. The contract is for the 1982-85 seasons.

Such a bowl ban against a large number of CFA schools could put the bowls in an awkward position, including the three bowls — Orange, Cotton and Sugar — which have tieups with conferences whose schools are members of the CFA.

The CFA is composed of the members of the Big Eight, Southwest, Southeast, Atlanta Coast and Western Athletic conferences and 17 independents, including Notre Dame, Pittsburgh, Penn State and Florida State. Most of the bowl teams usually come from that group. The only major football powers not aligned with the CFA are the members of the Big Ten and Pacific Ten conferences.

Orange and Cotton Bowl officials were non-committal Thursday about what they might do in such a situation, but Mickey Holmes, executive director of the Sugar Bowl, said the Sugar Bowl would go "with

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NCAA Could Penalize CFA With a Bowl Ban

From Page 27

our partner," the Southeastern Conference.

Holmes was asked what the Sugar Bowl would do if a large number of CFA schools went with NBC and were then banned from bowls by the NCAA.

"If the SEC decides they will be part of the CFA, that's fine," said Holmes, "and if they decide they will be part of the NCAA, that's fine. If the NCAA should put sanctions against a large number of CFA teams, if the CFA has certification procedures, which I imagine they would, we would move towards certification by the CFA."

Holmes said he has already communicated that position to Boyd McWhorter, commissioner of the SEC.

Steve Hudson, president of the Orange Bowl, [illegible] once, said: "We think our best course of action now is to stay out of it. When the smoke clears, then we'll decide what that means for us, and where we go from here."

Jim Brock, executive vice president of the Cotton Bowl, which takes the Southwest Conference champion as its host team, said the matter hasn't been discussed with the SWC officers or the executive committee and that the conference hasn't taken a position on the matter.

He pointed out that only two schools that are not members of the CFA have ever appeared in the Cotton Bowl, Randolph Field (an armed forces team in Texas) in 1944 and Oregon in 1948.

Tom Hansen, assistant executive director of the NCAA, says such a situation could also pose an extremely difficult problem for such bowls as the Fiesta, Gator, and Liberty, which do not have conference tieups and must look around the nation for the best remaining teams.

The Rose Bowl has a tieup with the Big Ten and Pac-10.

Hansen said Thursday that if a bowl invited a team that was banned from post-season appearances by the NCAA, "it would lose its certification and no NCAA team could participate."

There are a lot of ifs involved in the situations, but they are ifs that the CFA members must consider as they prepare to take a final stand on the TV contract.

As is not commonly understood, the CFA schools will not "vote" on the NBC contract. When the CFA members approved the contract at Atlanta last week (by a reported margin of two votes), the terms of the proposal committed all 61 members to the contract. However, the schools have until Sept. 10 to withdraw by notifying the CFA in writing. However, those schools who wish to participate, do not have to take any action.

After the Sept. 10 deadline, the CFA will then notify NBC of the name and number of the schools committed to the contract. NBC then has the option to accept that number for the full terms of the contract, renegotiate if the number is too small or void the contract altogether.

[illegible] tions proceedings at that time, and instructed that it be handled "expeditiously."

That raises the point, presuming the contract is approved, of whether the procedures could be completed before the bowl games following this season, or for that matter, before the end of the regular season.

"I have no idea how long it would take," Wright said. "How, for example, would you process 33 schools, as a group or one at a time? I would be startled if we brought it to completion before Jan. 1."

Hansen said that while it might be theoretically possible to finish the process before the end of the regular season (which would raise an interesting question about participation in regular-season telecasts), he didn't think it was likely.

The infractions committee decides the penalties, which are subject to appeal to the Council, and if they are upheld, the matter can then be appealed to the NCAA convention, but the penalties would apparently go into effect after the Council ruling, NCAA officials said.

Of course, the CFA could also go to court seeking an injunction against such sanctions, and that could result in a test case that might last indefinitely. Neither side, so far, has shown an eagerness to go to court, however.

Rebel trivia

A few bits of Ole Miss football trivia gleaned from the handsome Rebel press guide:

• On Nov. 11, 1893, Ole Miss beat Southwestern Baptist of Jackson, Tenn., in the first football game played in Mississippi. The first touchdown was scored by one Mordecai Jones, a law student from Newman, Ga. A newspaper account described it thusly: "... Jones goes through the line for a touchdown and with the ease of a veteran develops a goal."

• Ole Miss played St. Louis in 1938 and managed to get past midfield only twice the entire game. The Rebels won 14-12.

• Ole Miss has played in 32 one-point games in 84 years of football. The Rebels have won only nine. Three of those have been with Mississippi State, and the Rebels have won all three.

• When Ole Miss was training for its first football season in 1893, the team was responsible for choosing its colors. Manager-coach A.L. Bondurant later recalled, "The team had much discussion as to the colors that should be adopted, but it was finally suggested by the manager that the union of the crimson of Harvard and the navy blue of Yale would be very harmonious, and that it was well to have the spirit of both of these good colleges."

Taking it easy

Indiana coach Lee Corso has a style all his own.

"A sense of humor is not necessarily a weakness," he says.

As for pressure, "I never worry about the other team or the weather," he says. "Those are two things over which you have no control."

Making money faster

Arnold Palmer was the first golfer to win a million dollars. It took Arnie 13 years and two months to do it. Since then, the pace is much faster.

Jack Nicklaus made his first million in eight years. It took Lee Trevino six years, 11 months. Tom Watson and Ben Crenshaw share the record for the shortest time — six years and seven months.

Kathy Whitworth, who became the first LPGA golfer to reach seven figures, needed 23 years to do it. On the same day she became the first LPGA golfer to make a million, John Mahaffey became the 31st PGA pro to do it.

Did Bum play?

Asked if he had ever played college football, New Orleans Saints coach Bum Phillips answered, "I thought so until I looked at some of the old movies when I was at Stephen F. Austin College."

Phillips, of course, is a Bear Bryant disciple, having played and coached un- [illegible] Bryant

NCAA exec contemplates CFA dispute

SEP 2 8 1981

'The bone of contention is the reorganization of 137 Division 1-A schools. The CFA would like to see that come down to 90.'
— Tom Hansen

Tom Hansen, the NCAA executive director for communications, has dealt closely with the current controversial situation involving the NCAA and the College Football Association (CFA). Here, in an interview with Clarion-Ledger sports writer Rick Cleveland, Hansen discusses that situation and some possible solutions.

As others view the NCAA-CFA controversy

"We hope that the NCAA position will stay the same. We think the situation now is the best way to control organized athletics. Although, if the big boys (CFA) go separate, we'll probably get more exposure on television because as I underatand it, the TV contract is already signed. Nevertheless, I hope the NCAA will remain as is."
— Marino Casem, Alcorn A.D.

"I hate to see a controversy come up. There's correctness on both sides. I think the biggies (the CFA) have a real concern that they can't control their own destiny. At the same time, I do think they need to stay within the NCAA umbrella. I hope that the NCAA is called into a special session and something is done. The problem lies in [illegible] e weaker Division I schools, not with Division II and Division III. The answer is a special convention and it should be done immediately."
— Jim Montgomery, Millsaps A.D.

"We voted to ratify the CFA package. The key issue is property rights. The CFA schools are claiming that their football programs are the property of the schools and not the NCAA. With the NCAA's television deal with ABC, we are guaranteed nothing. Under the CFA's deal with NBC, we get two guaranteed television appearances and a great deal of money. The NCAA also gets eight percent of the deal. We feel the CFA deal is in the best interest of everyone and certainly us."
— Roland Dale, USM A.D.

"I'm totally opposed to what the CFA is attempting to do. I feel they are attempting to push small schools further down the ladder as it pertains to enjoying some of the fruit of being a member of the NCAA. I was appalled at some of the ratosain the CFA is taking when it comes to initiating their own package — especially since the NCAA had just signed the most lucrative TV deal in the history of collegiate football. Jackson State is proud of the TV deal that the NCAA negotiated which guaranteed its entire membership an opportunity to t eon TV."
— Walter Reed, Jackson State A.D.

Q. First off, how serious is the CFA's threat to the NCAA?

A. It is a very serious matter, in that you have some very important institutions which have a number of different reasons why they are discontented. Television is not really the central issue, as many would have you believe. The TV matter has brought the discontent to a head. The television matter has seized center stage. The real bone of contention is the reorganization of Division 1-A. The organization of Division 1-A has never been achieved to the degree it was achieved in the other divisions, and for that reason we have a lot of frustration and discontent among the bigger athletic programs. As you know, there are 137 Division 1-A schools. The people in the CFA would like to see that come down to 90 or in that neighborhood. This is the real issue that needs to be addressed. The television thing is the second issue that must be addressed. The CFA's concern is that everyone in the NCAA votes on the TV package. Some people think only football members should vote. Others feel only Division 1-A football members should vote. We're currently in the process of talking to conferences and their representatives to attempt to determine how best to address these particular concerns.

Q. In recent days, there have been stories saying the NCAA might try to appease the CFA schools. What would this entail?

A. The approach that would be necessary to allay the CFA's concerns would be to propose legislation that would alleviate conditions that trouble them now. Then, to signify that the proposed legislation would be supported by the NCAA council and to pledge to bring it before a forum for early resolution.

Q. The Big Eight and Southeastern conferences have called for a special convention in the near future. What are the possibilities?

A. The NCAA is evaluating a special convention and whether or not it is feasible. The NCAA Council has scheduled a lot of calls for Tuesday to determine whether there's a strong desire among members to commit the resources and time to a special convention or whether or not they would be just as well served to have some other type of commitment like we just discussed that would be taken care of at the regular meeting in January. One problem with a special convention is that there must be 60 days of notification before any proposed legislation can be acted upon. So, you're talking about a special convention in November. The Big Eight specifically suggested Nov. 15. We are trying to see if that is what everyone wants. If so, we'll get after it and try to do it.

Q. The argument of the CFA is that the football programs are the property of the schools themselves and not the NCAA. Therefore, they should have a say in television rights. That seems logical. What is the NCAA's argument?

A. In reality, the NCAA doesn't disagree with the fact that the programs are the property of the institutions. The point is, the institutions have granted to the NCAA the right to act as an agent in creating an arrangement whereby the network will contract with the institution. There is no seizing of a property right. The institution remains able to decline to participate in the NCAA program. The CFA would do the same thing. It would operate as an agent for the institutions. In fact, in many ways the CFA deal was more restrictive than the NCAA contract with ABC and CBS. Also, there seems to be some concern that the NCAA has seized the cable rights for college football. Again, this simply isn't true. The NCAA has not seized the rights. The NCAA plan has always controlled the rights to all simultaneous television. The one new thing the NCAA was doing was we were in the process of adding a supplementary series of games on Saturday night, so that the schools that don't normally get Saturday afternoon exposure would receive exposure on Saturday night. ESPN, USA Network, Ted Turner and even the networks themselves were all interested in the secondary series.

Q. The NCAA has talked of sanctions against any and all schools who take part in the CFA-NBC package. What kind of sanctions? Is expulsion from the NCAA a possibility?

A. Expulsion would be the maximum penalty. There are several possibilities, like ineligibility for conference championships and loss of voting privileges. There have been several occasions when a school is instructed not to conduct a program for a year or two. There are a wide range of sanctions possible and it's hard to speculate on which ones would be selected.

Q. What do you think will happen?

A. It's very speculative right now. I do believe that the NCAA will address the concerns of the CFA members and other members in a positive and forthright manner. Right now, that's as far as I can, too.

[illegible] Right

c/o Clarion-Ledger Sports, P.O. Box 40, Jackson, 39205

DEFENDANT'S EXHIBIT GP

FRED C. DAVISON
Chairman of the Board
University of Georgia
Athens, Georgia 30602

HENRY T. LOWE
Secretary/Treasurer
State Hall
Columbia, Missouri 65201

CHARLES M. NEINAS
Executive Director

P. O. Box 4148
Boulder, Colorado 80306
(303) 449-1297

COLLEGE FOOTBALL ASSOCIATION

MEMORANDUM

TO: Board of Directors
FROM: Chuck Neinas, Executive Director
SUBJECT: University Sports Association
DATE: November 19, 1981

During the past two or three months several individuals, including college presidents, commissioners and members of the CFA Board of Directors, have suggested that it would be advisable to develop a structure for a national organization parallel to that of the NCAA, should it ever be necessary to consider such a move.

Please find enclosed the draft of a paper that will be discussed with the conference commissioners and others on November 24.

Your comments, ideas and suggestions are welcomed.

cc: Selected Individuals

Enclosure

DEFENDANT'S EXHIBIT

STRUCTURE FOR NATIONAL SPORTS ORGANIZATION

Working title of organization—University Sports Association (USA)

Board of Directors would be comprised of one representative from each member conference and two representatives elected by the independents. The Board would be responsible for the development of policy, the operation of the organization including its financial affairs, serve as an appeals board for matters related to eligibility and enforcement and employ the organization's chief executive officer.

Commissioners Committee would include the commissioner of each member conference plus two representatives elected by the independents. The Commissioners Committee would be responsible for the development of interpretations, assist with the enforcement operation, supervise the administrative operation of the USA and serve in a consultant capacity to the Board of Directors.

Enforcement Committee would be comprised of one representative from each member conference and one or two representatives of the independents. The Committee would be responsible for supervising the general enforcement operations of the organization. In those incidents where it is necessary to have an infractions hearing a panel of three persons would be selected from the Committee to hear each case with the understanding that no Committee member would be involved in hearing a case involving one of his or her constituents.

Competition Committee for Men would be comprised of one representative from each member conference and two representatives from the independents. The Committee would be responsible for the conduct of the championshiips for men including financial affairs, detrmination of dates and sites, qualification procedures and other details. The Competition Committee for Men would forward its recommendations to the Commissioners Committee.

Competition Committee for Women would be comprised of one representative from each member conference and two representatives from the independents. The Committee would be responsible for the conduct of the championships for women including financial affairs, determination of dates and sites, qualification procedures and other details. The Competition Committee for Women would forward its recommendations to the Commissioners Committee.

Television Committee would be comprised of one representative from each of the member conferences and two elected by the independents. The Television Committee would be responsible for the development of a football television policy to be approved by the membership and the sale of television rights for the championship events conducted by the USA. The Television Committee would report to the Board of Directors.

Post-Season Football Committee would be comprised of one representative from each member conference and two representatives elected by the independents. The Committee would be responsible for the certification of post-season football games and report to the Board of Directors.

Presidents Committee would be comprised of one representative from each member conference and two representatives elected by the independents and forward its recommendations to the Board of Directors.

Faculty Representatives Committee would be comprised of one representative from each member conference and two representatives elected by the independents and forward its recommendations to the Board of Directors.

Directors of Athletics Committee would be comprised of one representative from each member conference and two representatives elected by the independents and forward its recommendations to the Board of Directors.

Women's Athletic Administrators Committee would be comprised of one representative from each member conference and two representatives elected by the independents and forward its recommendations to the Board of Directors.

Coaches Committee would consist of eleven persons, a minimum of three of which must be women. The Coaches Committee shall be elected annually at the Coaches Congress and shall forward its recommendations to the Board and in general reflect the views of the coaches relative to the conduct of intercollegiate athletics. The Coaches Committee must include a minimum of two football coaches, one men's basketball coach and one women's basketball coach.

(Note: A representative from the Presidents, Faculty Representatives, Directors of Athletics, Women's Athletic Administrators Committee should be considered for an ex officio position on the Board of Directors. In addition, the possibility of having one or more representatives from the Coaches Committee serving in an ex officio capacity on the Board should also be considered.)

Other Committees. The Board of Directors may establish other committees as are necessary to assist in the development and operation of the organization. Such committees may either be permanent or temporary. The committees which would be required to assist in the development of the organization would include a Legislative Committee, Editorial Committee, Academic Standards Committee, Research Committee and Recruiting Committee.

Other recommendations:

(1) Membership in the University Sports Association should be based upon the criteria established for membership in NCAA Division IV or the CFA.

(2) Existing NCAA rules and regulations should be followed relative to amateurism, eligibility, recruiting, financial aid, etc. until the organization establishes its own rules and regulations governing such matters.

(3) When developing an enforcement program consideration should be given to the establishment of an educational component as well as possible development of an athletic auditing system.

(4) It may be necessary to establish individual sports committees to assist in the conduct of championships and to be responsible for the playing rules related to specific sports. The composition of such committees could be determined later but should include both athletic administrators and active coaches.

(5) A Coaches Congress should be conducted at the annual meeting of the organization which should be conducted during the month of June. At that time the various coaches groups could meet individually and collectively and develop recommendations for consideration by the Board of Directors and/or membership.

(6) At some future time the organization may wish to consider the establishment of a centralized officiating agency for the sports of football and basketball as part of the USA or coordinated through the USA. Such an agency would be responsible to the Commissioners Committee.

(7) Inasmuch as the Commissioners Committee would be required to assist in the administration of the overall program the independents may wish to employ an administrator to coordinate their activities related to the USA or this could be accommodated through the USA staff.

(8) The legislative process would be similar to that used by the College Football Association. Proposed legislation would be circulated thirty days in advance of the annual meeting with each member university having one vote on legislative and policy matters.

(9) It may be necessary for the USA to provide certain statistical and publication services. The use of an outside firm to contract for such services should be considered rather than assuming that this would be a staff function.

(10) If the membership so desired, the USA could explore the possibility of providing an insurance program similar to what is now offered by both the NCAA and NACDA.

Championship Events Program. It is recommended that the USA sponsor eleven national championships for men and eleven national championships for women as follows:

Championships for Men: basketball, baseball, indoor track, outdoor track, cross country, gymnastics, wrestling, swimming and diving, golf, tennis and soccer.

Championships for Women: basketball, softball, indoor track, outdoor track, cross country, gymnastics, volleyball, swimming and diving, golf, tennis and field hockey.

Staff Required to Administer USA Activities. It is suggested that the USA Board of Directors employ a chief executive officer to be given the title of President.

It would be both appropriate and advantageous to employ the services of a current or former college president or chancellor, preferably someone with an athletic background or a demonstrated interest in athletics. Such an individual would have the advantage of understanding the operation of a university, would be conversant about those matters affecting higher education, would enjoy the respect of other chief executive officers and could provide the administrative capability to oversee the operation of the organization. The president would be responsible to the Board of Directors.

Executive Vice President would be responsible to the President and assist with the general administration and operation of the

organization. The executive vice president should be someone with previous experience in the area of athletic administration.

Competition Coordinator would be responsible for coordinating the activities associated with the championships sponsored by the USA and would serve as liaison to the Coaches Congress and various sports committees.

Assistant Competition Coordinator would assist the Competition Coordinator.

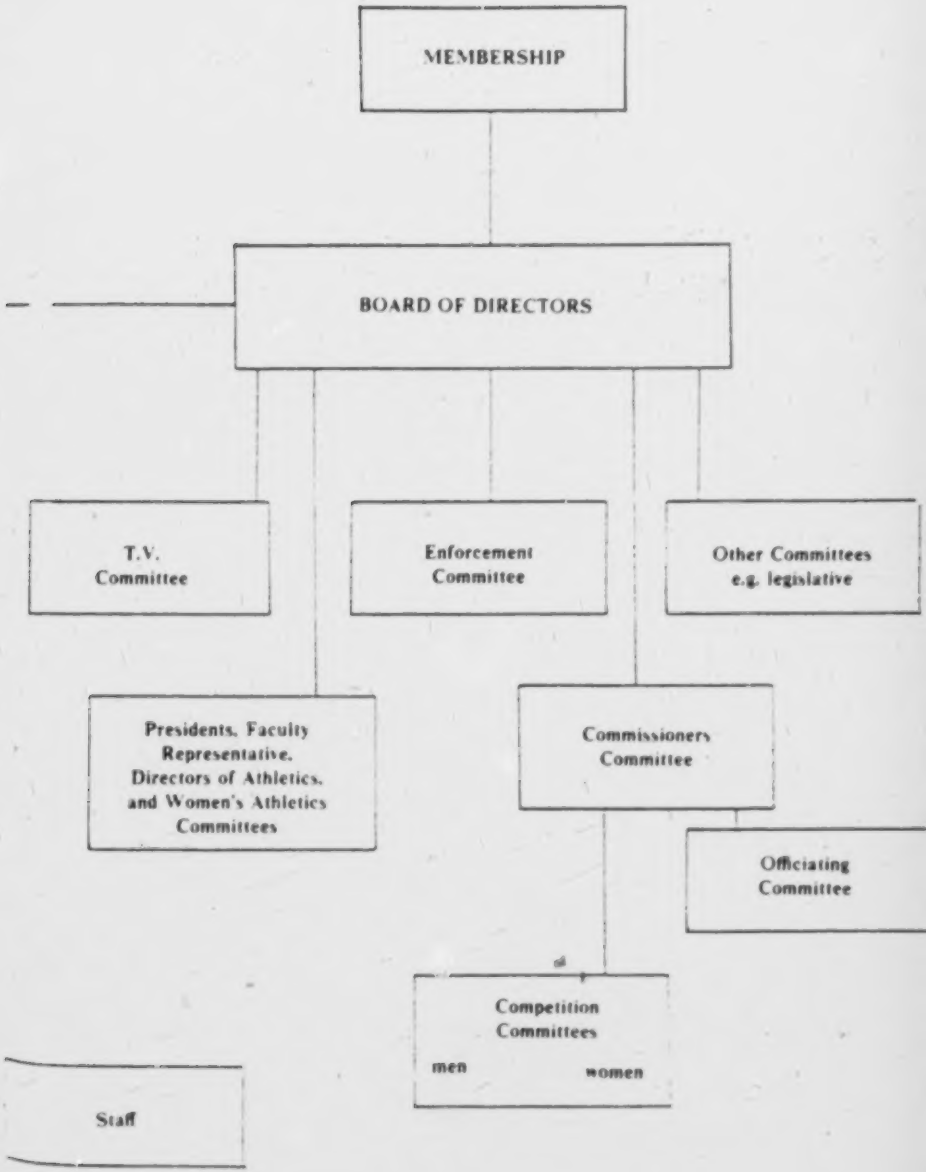
Chief of Enforcement Operations would be responsible for the conduct of the organization's enforcement program and would assist the Enforcement Committee.

Enforcement Assistant. The number of assistants required to adequately staff the enforcement department would have to be determined.

Public Relations Director would be responsible for the organization's public relations efforts and could also serve as television program coordinator in connection with the sport of football.

Officiating Coordinator (optional) would be responsible for administrating the USA officiating agency in the sports of football and men's basketball. Such an individual would be employed only if it was determined that a centralized officiating agency would be of beneficial service to the membership.

Additional Staff. Business manager, secretary to the president, secretary to the executive vice president, secretary for enforcement operations, secretary to competition coordinators, secretary to the public relations director and receptionist.


MEMBERSHIP
BOARD OF DIRECTORS
T.V. Committee
Enforcement Committee
Other Committees e.g. legislative
Presidents, Faculty Representative, Directors of Athletics, and Women's Athletics Committees
Commissioners Committee
Officiating Committee
Competition Committees
men
women
Staff

PLAINTIFFS' EXHIBIT 13

The National Collegiate Athletic Association

President
JOHN A. FUZAK
Michigan State University
East Lansing, Michigan 48824

Executive Director
WALTER BYERS

Secretary-Treasurer
STANLEY J. MARSHALL
South Dakota State University
Brookings, South Dakota 57006

MEMORANDUM

Pls revise this memo to conform as indicated; also revise any other reports and records accordingly. It is too easy to slip into bad habits on this and we should carefully follow the principles which have guided us in the past in our relationship with ABC and in the determination of rightsfees for NCAA championships.

TO: Walter Byers.

SUBJECT: Reallocation of Television Income.

The Television Committee took several actions at its January meeting to slightly reallocate some income from the Football Series in 1976 and 1977.

The actions, in my opinion, need approval of the Officers on behalf of the Executive Committee, and, perhaps, the Council. First, in an action that does not require approval, but is merely reported, the Committee set the 1976-1977 rights fee at $501,538 for a national game and $380,000 for a regional game. The regional is worth 75.8 per cent of the value of a national.

The Committee then agreed to allocate as a rights fee for the four regular season games of Division II and Division III which are to be televised each year an annual rights fee of $190,000 (one-half a regional fee).

Next, it was agreed too much money could go to the participants in the regular-season games in relationship to the income received by a Division II Champion ($52,000 in 1974), depending on the ability of the Association to hold down the production costs for those games.

It was proposed, therefore, that a portion of the $190,000 be added to the rights fee for the Division III Championship telecast. It was pointed out that Championship had been expanded in 1975 from four teams to eight, that attendance had been poor and the financial conditions unfavorable.

After study, it was voted:

> That of the $190,000 allocated to regular season Division II and Division III games, $70,000 be added to the $80,000 rights fee for the Division III Championship, with the four regular season Division II and III games to divide $120,000 (after payment of production costs). Rights fee for the Division III Championship will remain at $420,000.

The Television Committee voted the $500,000 to Divisions II and III at its Birmingham meeting. No formal approval was sought nor granted. I do not believe the Executive Committee has divided the $500,000. The $420,000-$80,000 split is that of 1975.

Also, somewhat to my surprise, no dollar allocations were specified in the memorandums covering the 1975 referendum. Perhaps this information was omitted deliberately to give the Executive Committee an opportunity to exercise its options when additional information was available concerning production costs of the Division II and III telecasts.

I hope the Executive Committee will approve the arrangement as I believe it is the most equitable distribution of the monies available to II and III.

Incidentally, its primary author was Milt Weisbecker of Division III. George Hansell seconded its reasonableness. The Division I members, including Stan Bates of Executive Committee, didn't care how dollars were awarded, as long as II and III were happy.

TOM HANSEN
January 23, 1976

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PLAINTIFFS' EXHIBIT 6

AGREEMENT

AGREEMENT dated as of June 10, 1977 by and between ABC SPORTS, INCORPORATED, a subsidiary of American Broadcasting Companies, Incorporated, 1330 Avenue of the Americas, New York, New York 10019 (herein called "ABC") and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, U. S. Highway 50 and Nall Avenue, Shawnee Mission, Kansas 66222 (herein called "NCAA").

1. NCAA hereby agrees to grant to ABC the exclusive rights for live or simultaneous telecasting of NCAA football games for each of the four seasons—1978, 1979, 1980 and 1981—and five NCAA championship events* (other than basketball) to be selected by ABC. Such football games include four division II and three Division III regular season games in each year and the four Division II and III post-season championship games, consistent with prior years.

2. The minimum aggregate compensation to be paid by ABC for such games and championship events shall be $29,000,000 for each of the 1978 and 1979 seasons and $30,000,000 for each of the 1980 and 1981 seasons; provided that, if the U. S. Bureau of Labor Statistics Consumer Price Index—U. S. City Average for All Items (1967 = 100) as of January of 1980 exceeds the same figure for January, 1978, by fifteen per cent (15%) or more, then the minimum aggregate compensation to be paid by ABC shall be $31,000,000 for each of the 1980 and 1981 seasons.

3. During each season, ABC may televise 23 exposures consisting of 116 team appearances; the exposures may be composed of 13 national games and 10 regional dates of 45 games (or any re-mix thereof which shall be subject to reasonable NCAA approval), so long as the team appearances

* annually

are at least 116. ABC shall have flexibility with regard to the dates and times of scheduling its telecasts, but radical departure from the traditional Saturday telecast scheduling shall be made only with NCAA approval. In the event the aggregate minimum compensation to be paid by ABC shall be increased pursuant to paragraph two above, then the number of exposures allowed ABC shall be increased to 24 for each of the 1980 and 1981 seasons, with a commensurate increase in team appearances.

4. In each game in each season, there shall be not more than 22 commercials in not more than 21 positions. During the halftime of one of the games of any double-header date, ABC may, in addition to the foregoing, allocate not more than five minutes to the presentation of news.

5. If, during the term of this agreement, NCAA shall institute football playoffs leading to a Division I national championship, the NCAA Council will recommend to the appropriate authority that ABC be given the right of exclusive first negotiation with respect to the televising of such playoff games.

6. Appearance limitations as applied in the administration of the 1976-1977 NCAA Football Television Plan shall apply over each of the 1978 and 1979 consecutive seasons and the 1980 and 1981 consecutive seasons.

7. NCAA agrees to negotiate in good faith exclusively with ABC for a twenty-eight (28) day period, with respect to the sale of television rights for one or more football seasons subsequent to 1981. NCAA agrees to consult with ABC with regard to the date upon which the 28 day period shall commence, and will seriously consider ABC's views thereon. NCAA then will notify ABC in writing of the date upon which the negotiations shall commence not less than 15 days prior thereto. If at the end of such twenty-eight (28) day period ABC and NCAA have not reached agreement, then each party

agrees to advise the other in writing as to the final monetary and other terms acceptable to it. If neither party accepts the final terms of the other in writing within two (2) business days from the date of receipt of such final terms, then NCAA shall be totally free to sell or grant such rights to any third party; however, NCAA agrees not to grant such rights to any third party on monetary terms which are less than those set out in its final offer to ABC without giving ABC three (3) business days within which to acquire such rights on the same terms offered to said third party. ABC's written offer, which may be increased during the two day period, shall be irrevocable for three business days after said two day period. NCAA will not, during the thirty (30) day negotiation period negotiate the sale of such rights with or offer such rights to anyone other than ABC, but NCAA shall not be subject to any restriction in conversing with others.

8. ABC agrees to work with NCAA to accommodate the telecasting of the semifinal and final playoff football games of a new Division I-AA (if such new division is created and implemented during the term hereof) and to include mutually acceptable provisions in this regard in the detailed written contract referenced in paragraph nine below.

9. This agreement is subject to:

(a) subscription, within fifteen (15) days from the date hereof, by ABC of a detailed written contract (the financial performance of which is to be guaranteed by American Broadcasting Companies, Incorporated) which will include the foregoing provisions of this agreement and other terms, not inconsistent with the foregoing, conforming with the principles set forth in the 1978 and 1979 NCAA Football Television Program (attached hereto as Exhibit A) and with the general practices and dealings between NCAA and ABC with respect to the telecast by ABC of football games under prior NCAA Football Television Plans and agreements, and

(b) the approval of such detailed written contract by a two-thirds vote of the members of the NCAA Council present and voting. NCAA agrees that, if the Council fails to approve such detailed written contract, NCAA will give ABC in writing the specific objection(s) of the Council and will negotiate in good faith with ABC in its attempts to cure such objections within five (5) business days from the date of ABC's receipt of such objection(s) and will not grant such rights to any third party during such (5) day period.

THE NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

/s/ Walter Byers
Executive Director

ABC SPORTS, INCORPORATED

/s/ James R. Spencer, Jr.
Vice President,
Program Planning

ABC SPORTS, INC.

A Subsidiary of American Broadcasting Companies, Inc.

AGREEMENT

AGREEMENT dated as of June 10, 1977 by and between ABC SPORTS, INC., a subsidiary of American Broadcasting Companies, Inc., 1330 Avenue of the Americas, New York, New York 10019 (herein called "ABC") and THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, U. S. Highway 50 and Nall Avenue, Shawnee Mission, Kansas 66222 (herein called "NCAA").

IN CONSIDERATION of the mutual covenants herein contained, the parties hereto have agreed and hereby do agree, as follows:

1. The parties hereto agree to abide by the 1978-1981 NCAA Football Television Plan (the "Plan") as modified by the terms and conditions set forth herein. A copy of such Plan is attached hereto as Exhibit A and made a part of this Agreement.

2. (a) NCAA hereby grants to ABC the exclusive right to "telecast" (as hereinafter defined, during each season of the Plan a series of twenty-three "exposures" covering a minimum of one hundred sixteen team appearances for collegiate football games as provided in the Plan. In the event the aggregate minimum compensation to be paid by ABC shall be increased pursuant to paragraph three hereof, then ABC shall have the right to increase the number of exposures by one for each of the 1980 and 1981 seasons, with a commensurate increase in team appearances.** in the event a new Division I-AA is organized and becomes operative before commencement of any season of the Plan, ABC shall have the right to increase the number of exposures by one for any one season of the Plan thereafter with a commensurate increase in team appearances for that season.

** Irrespective of the foregoing.

(b) * ABC agrees to telecast the games of each exposure in each of said years in accordance with the format set forth in the Plan.

(c) ABC shall freely negotiate and contract individually with NCAA member colleges for the telecasting of games subject to the terms of this contract.

3. Provision re compensation deleted.

4. The minimum aggregate compensation for each year hereof, set forth in paragraph 3 above, includes payment for ABC's exclusive right (and obligation, which ABC hereby assumes) to telecast during each year hereof, on a live and/or delayed basis (such telecasts are contemplated as part of ABC's Wide World of Sports television program series), five non-football NCAA Championship Events other than Division I basketball in accordance with Article 22 of the Plan. Periodically following determination of the schedule for such events NCAA shall advise ABC in writing of the scheduled dates and locations for the holding of such Events, and ABC shall advise NCAA in accordance with the terms of the Plan of such events which ABC selects for telecast and the year(s) during the Plan which it elects to telecast same. NCAA agrees that there shall be no live telecast of any such Event (other than Division I basketball), or any delayed telecast within thirty days of the Event,** by any third party during any year covered by this Plan, unless ABC shall have advised NCAA that ABC will not be selecting that Event for telecast for that year, or unless with respect to any year, ABC shall fail to advise NCAA on or

* Except as otherwise specifically provided in this agreement.

** (or later as mutually agreed upon).

before the applicable time that ABC has selected such Event for its telecast. Notwithstanding the foregoing, if NCAA gives written notice to ABC at any time that it desires to make any such event available for television to another, ABC shall have ten business days thereafter to select such event as one of the five required to be telecast under the Plan, or as an additional event to such five. Subject to agreement upon the terms for additional events ABC may select more than five such championships for telecast during any year, but it may not rescind any selections theretofore made by it.

5. (a) ABC's rights herein with respect to the games of the series, the post-season NCAA championship football games and the NCAA Championship Events, shall be exclusive for simultaneous telecasting, pursuant to the Plan, throughout the world in any area to which simultaneous telecasting is possible and will occur. The term "telecast", as used herein, means the live or simultaneous broadcast, transmission or exhibition by television methods, devices and improvements thereof, whether now known or hereafter developed. The games herein may be telecast over such type and/or specific telecasting facilities as ABC may select or authorize.

(b) Additionally, ABC shall have the right to telecast any of the games of the series on a delayed basis in all geographical areas outside of the territorial boundaries of the first forty-eight states of the United States.* No pre-game or post-game show shall be required to be telecast in connection with any such delayed telecast. ABC shall keep NCAA advised as to the telecasts of the games in areas outside of the United States, its territories and possessions.

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* and in Hawaii and Alaska on the 7th day following the game; provided that, any delayed telecast outside the fifty United States shall be subject to the prior approval of NCAA.

(c) With respect to the dates of the series specified in Article 5, and the format outlined in Article 6, it is understood that dates other than those specified which have been customarily utilized by ABC in the past may be utilized under the Plan, and that the second game of a doubleheader on Thanksgiving may be a night game. The NCAA Television Committee will give serious consideration to a request by ABC for a night telecast on the Friday . . . able efforts to avoid scheduling such a telecast If said Committee acts favorably on such a request,* decision will require approval by the NCAA Council under Article 26 before such a telecast is authorized under the Plan.

(d) With respect to paragraph (d) of Article 22 of the Plan, if the weekly highlights show is 30 minutes in length, ABC shall present on other programs during the year a minimum of two segments of at least 15 minutes duration on college football. One segment shall be presented in the Spring and the other at a later time selected by ABC which is acceptable to NCAA. It is agreed that NCAA shall develop and submit to ABC at such time as shall be reasonably requested by ABC, the copy, concepts and general outlines of various suggested presentations for these segments, and that ABC may select therefrom those it wishes to utilize and ABC shall have sole authority for the production of, and will produce such segments at no cost to NCAA. ABC, at its election, may assign production of such segments to NCAA Productions subject to mutual agreement on the compensation and other terms of such assignment.

(e) With respect to paragraph (g) of Article 22 of the Plan, ABC shall schedule its NCAA football programming to allow a reasonable post-game show consistent with prior years; provided that the parties hereto agree that ABC shall be

* it will forward its favorable recommendation to the NCAA Council, it being understood that the Committee's

automatically released from the requirement of telecasting any such show if such telecast would cause ABC to violate any applicable provisions imposed by the Federal Communications Commission. A pre-game show shall not be required prior to the second game of a doubleheader presentation.

(f) The starting times for the Division I-AA Football Championship games, if any there be which are telecast from the Pacific Coast, shall be 11:35 a.m., Pacific Standard Time.**

(g) The aggregate 16 required appearances set forth in paragraph (b) of Article 13 of the Plan for the member institutions of the Mid-American Conference, Pacific Coast Athletic Association, Southern Conference, Southland Conference, Missouri Valley Conference, and for the Division I independents referred to therein, shall include a minimum of one appearance for each of said named conferences.

(h) In scheduling games pursuant to the Plan, ABC may elect to treat an appearance of either or both teams on a "special exceptions" date under Article 14 of the Plan as a regular appearance not subject to the "special exceptions" provisions.

(i) It is agreed that an exception telecast under paragraph (h) of Article 16 of the Plan will not be approved by the NCAA Television Committee if the telecast will conflict with a Series telecast at night or on Labor Day.

(j) In the event ABC desires to telecast a series game not theretofore scheduled involving as a participant a member of the NCAA which was not eligible for an appearance under the Plan until less than one week prior to such game, it can procure

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** if ABC cannot reasonably schedule the telecast for a later time.***

*** Division I-AA Championship Football Games played in the Eastern (light levels permitting) Central or Mountain time zones will be scheduled to commence at approximately 1:35 p.m. current New York time ("CNYT"), except that a game in the Mountain time zone may commence at approximately 2:05 p.m. CNYT **** and and except that ABC will endeavor to commence its telecast of a game in the Central time zone at approximately 2:05 p.m. CNYT.

**** unless NCAA elects to start the game at the normal specified time.

a waiver of the five days selection limitation set forth in the third paragraph of Article 12 upon application to the NCAA Television Committee prior to contacting such participant.

6. (a) As provided in the Plan, only sponsors approved by the NCAA Television Committee may be used for any football game or other program telecast pursuant to the Plan. Approved sponsors shall not include producers or purveyors of alcoholic beverages (except as hereinafter specified); feminine hygiene products; laxatives; habit-forming drugs; tonics of a dubious purpose; cigarettes; political organizations of any kind; or organizations whose policies or purposes are controversial; and, no commercial may be used which debases or which is derogatory to college football or college athletics. The NCAA Television Committee may approve as sponsors: pharmaceutical firms with institutional advertising or with advertising of products not specifically banned hereby; producers of analgesics, cold remedies or antacids which are in general use; and, producers or purveyors of athletic training aids.

(b) ABC shall take every reasonable step to discourage during the telecasts hereunder the use by sponsors of commercials featuring current professional athletics who participate in sports regulated by the NCAA, and, specifically, ABC shall advise every potential sponsor accordingly before contracting with such sponsor. If any such potential sponsor insists on disregarding this policy, ABC shall consult with NCAA before contracting with such sponsor. However, it is understood that the decision to contract with such sponsor shall be ABC's.

(c) Sponsors advertising malt beverages, beer or wine are approved for a maximum of one commercial in each highlight show, one commercial each pre-game show and one commercial in each post-game show. Such commercials may be

either single sixty second commercials or two back-to-back thirty second commercials, and there shall be no more than sixty seconds of commercial* permissible in each show for such sponsors. Within each game a maximum of six such commercials are approved: one within positions two to five, one within positions six to nine, one within positions ten to eleven, one within positions twelve to fifteen, one within positions sixteen to nineteen, and one within positions twenty to twenty-one (as such positions are hereinafter set forth in paragraph 7(a)). The aforesaid commercials within each game may be thirty seconds, sixty seconds or back-to-back thirty second commercials, but there shall be no more than 180 seconds of commercial time permissible for such sponsors in the aforesaid six allowable positions during the game, and if* utilized, at least one** shall occur in positions ten to eleven.*** subject to the foregoing limitations, local station commercials on behalf of malt beverage, beer or wine sponsors may be used under the following circumstances:

(i) At ABC's option, a local station malt beverage or wine commercial may be used in lieu of any network commercial authorized above for one of the nine commercial positions totaling no more than three hundred sixty seconds. The local station may not combine these commercials with those permissible in subparagraphs (ii) through (vi) below so as to exceed the three hundred sixty seconds limit. A combination of commercial and station break usage is permissible so long as the total does not exceed three hundred sixty seconds. Any combination shall be subject to the placement requirements provided in subparagraph 6(c) above and the corresponding station break listed in subparagraphs (ii) through (vi) below.

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*time

* all 180 seconds allowable are actually

** thirty (30) second commercial

*** If fewer than 180 seconds are utilized, it is understood that 150 seconds may be utilized in the aforesaid positions other than positions one and positions ten to eleven.

(ii) If the ABC Television Network itself does not use a malt beverage, beer or wine commercial in the pre-game show, a local station may use a malt beverage, beer or wine commercial during the station break between the pre-game and game telecasts;

(iii) If the ABC Television Network itself does not use a malt beverage, beer or wine commercial during the first five commercial positions of the game being telecast, then a local station may use a malt beverage, beer or wine commercial during a half-time station break;

(iv) If the ABC Television Network itself does not use a malt beverage, beer or wine commercial during commercial positions eight through eleven of the game being telecast, then a local station may use a malt beverage, beer or wine commercial during the station break between the third and fourth quarters of the game;

(v) If the ABC Television Network itself does not use a malt beverage, beer or wine commercial during the post-game show, then a local station may use a malt beverage, beer or wine commercial during the station break between the game and post-game telecasts;

(vi) If no malt beverage, beer or wine network commercial is used in the highlights show and the highlights show is at least one hour in duration, a local station may use a malt beverage, beer or wine commercial in the station break in the highlights show.

In each and every case above, partial use of any commercial position for a malt beverage, beer, or wine commercial shall constitute full usage. Accordingly, if the network, for example, used a thirty second malt beverage, beer or wine commercial in position number eleven, it would not be permissible for the local station to present a thirty second malt beverage, beer or wine commercial during the station break between the third and fourth quarters.

(d) NCAA agrees to request NCAA member colleges not to permit cigarette advertising in any of their stadia during a telecast of any game of the Football series.

7. With regard to the commercial format set forth in Article 10 of the Plan, the following shall apply:

(a) there shall be twenty-one commercial positions distributed as follows:

Position No.	
1	Pre-game
2	First Quarter
3	First Quarter
4	First Quarter
5	Between Quarters
6	Second Quarter
7	Second Quarter
8	Second Quarter
9	Second Quarter
10	Half Time
11	Half Time
12	Third Quarter
13	Third Quarter
14	Third Quarter
15	Between Quarters
16	Fourth Quarter
17	Fourth Quarter
18	Fourth Quarter
19	Fourth Quarter
20	Post-game
21	Post-game

There may be ninety second commercials at position 5 and 11, and all other commercial positions will not exceed sixty seconds in duration. Position 20 may occur during the fourth quarter if it occurs during a natural time out which follows a natural time out not used for commercial purposes. If position 20 occurs during the fourth quarter position 21 may also occur during the fourth quarter if it occurs during a natural time out following an additional natural time out not used for commercial purposes.

(b) In addition, there shall be no more than two station breaks of no more than sixty-three seconds each from the beginning of the game telecast to the conclusion of the game telecast. Such station breaks shall be located as follows: There shall be one station break at half-time and one station break between the third and fourth quarters.

8. (a) In the event that the telecasting for any exposure of the basic series of games during the first three (3) years of the Plan is totally prevented due to war or national emergency, governmental restriction, preemption for an event of overwhelming public importance the occurrence of which is not within the control of ABC, weather, labor dispute (on one occasion only), act of God, failure of transmission facilities, or other like causes beyond ABC's control, or the failure to play any such game, then ABC may either substitute another game or games for telecast on the same date or, if this is impossible, telecast an additional game or games on a later date in lieu thereof, and there shall be no diminution of the aggregate minimum compensation payable hereunder. If such telecast prevention occurs in the first half of the 1981 season and because of scheduling difficulties it is impossible to make-up the "lost" telecast in 1981, there shall be no diminution of the aggregate minimum compensation, and such game or games may be made up in 1982 if ABC has the television rights for similar games for 1982. Should such telecast prevention occur during the second half of the 1981 season, ABC shall use its

best efforts either to substitute another game or to reschedule the telecast for a later date in 1981 or 1982 or 1983 if ABC has the television rights for similar games for those years, but if ABC is unable to do so, there shall be no diminution of the aggregate minimum compensation payable hereunder with respect to the first two exposures thus prevented, but there shall be a proportionate reduction in the aggregate minimum compensation payable hereunder with respect to any additional exposure thus prevented in the second-half of the 1981 season.

(b) In the event that any telecast of the basic series of games is commenced but is thereafter materially interrupted due to any of the reasons set forth in subparagraph 8(a) above, it is understood that ABC shall reschedule for inclusion in a subsequent game or games (in addition to the commercials permitted in the format for such game) at later dates during the term of this contract, or in 1982 if ABC has the television rights for similar games for 1982, any commercials ABC is unable to telecast because of such material interruption. However, should the number of commercials or other circumstances be such as to make it unreasonable in NCAA's opinion to reschedule such commercials in a later game or games, there shall be a proportionate reduction in the moneys payable pursuant to this Agreement based upon the number of commercials actually telecast in relation to the number of commercials scheduled and sold.

(c) Provision re a rule of conduct for game telecasts deleted.

(d) It is understood and agreed that for the purpose of paragraph 8(a) hereof, the requirements of Articles 13 and 14 of the Plan may be waived by the Television Committee.

9. NCAA agrees, should ABC be televising NCAA football games in a season in which Division I (Division I-A if a Division I-AA is operative) football playoff(s) are instituted, that the NCAA council will recommend to the appropriate authority that ABC be given the exclusive right of first negotiation with respect to the televising of such playoff(s).

10. On the day a Division II and III Championship football game is played ABC agrees not to telecast or authorize the telecast of any of said games, or any other football game, from a transmitter located within 120 miles of the site of any of the said games with NCAA's approval, not to telecast in the home television market of any participating team if, in NCAA's opinion, after consulting with ABC, such telecast would reduce attendance at any such game. If the site of such Division II or III Championship game is within 120 miles of a transmitter serving a television market of over 500,000 homes and a Series game is scheduled to be telecast over said transmitter in conflict with any such Championship game, ABC reserves the right to discuss with NCAA the advisability of telecasting the Series game over such transmitter as an exception to the aforesaid limitation and to seek NCAA approval of same, which approval will not be unreasonably withheld.

11. ABC shall have the right during regional telecasts of the games of the series to utilize in the post-game show of the game in one region live coverage or the taped highlights of such games in other regions.

12. In accordance with Article 11 of the Plan, ABC agrees to make the games available to any other network or station which may wish to telecast such games on condition that such other network or station agrees to pay for any and all line charges and all other necessary expenses (including but not limited to a proportionate share of the amount ABC pays for the rights to such game or games, any additional payments which may be required by applicable union contracts or by individual contract with any of the individuals concerned, any additional payments which may be made to the executive producer, director and any and all talent engaged for the program and a proportionate share of * technical pickup costs) to have the program fed to and telecast by such other network

*ABC's

or stations; provided that, such other network or station shall telecast each of the games in exactly the same manner (including play-by-play description, commentary relating thereto, half time entertainment and only the commercial messages authorized by ABC) as and with the same content on ABC's telecast with no deletions, exclusions or additions and with no insertion of commerical messages of any kind and without receiving any compensation from ABC or ABC's (or ABC's affiliates') sponsors therefor.

13. In Article 22(d) of the Plan, the reference to "mutual agreement" in the third sentence shall mean "mutual agreement of the Television Committee and the network if the time period offered on the network (to be fed in pattern time) is outside of 12 noon to 6 p.m. Sunday (or outside of 6 p.m. to 10 p.m. Monday through Wednesday).

14. With regard to Article 26 of the Plan, any modification which adversely affects ABC's rights shall be subject to mutual agreement.

15. If, during the period of this contract, there are telecasts not contemplated under this agreement of major college football involving as participants present members of NCAA, then it is mutually agreed to negotiate a reduction in price based upon the damage ABC suffers and upon the loss in audience attributed to such telecasts. If no agreement is reached, the parties agree to arbitration of a reduction in price under the rules of the American Arbitration Association.

16. Provision re future negotiations deleted.

acceptable to it. If neither party accepts the final terms of the other in writing within two business days from the date of receipt of such final terms, then NCAA shall be totally free to sell or grant such rights to any third party; however, NCAA agrees not to grant such rights to any third party on monetary terms which are less than those set out in its final offer to ABC without giving ABC three business days within which to acquire

such rights on the same terms offered to said third party. ABC's written offer, which may be increased during the two day period, shall be irrevocable for three business days after said two day period. NCAA will not, during the thirty day negotiation period, negotiate the sale of such rights with or offer such rights to anyone other than ABC, but NCAA shall not be subject to any restrictions in conversing with others.

17. This Agreement contains the entire understanding of the parties hereto relating to the subject matter herein contained, and this Agreement cannot be changed or terminated orally.

18. All notices hereunder shall be in writing and shall be by personal delivery or by mail or by telegraph, at the respective addresses of the parties hereto, hereinabove set forth, or such other address or addresses as may be designated by either party. Such notices shall be deemed to have been given upon being mailed, postage or other charges prepaid, or upon delivery to a telegraph office, charges prepaid or to be billed.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first written above.

ABC SPORTS, INC.
A Subsidiary of American
Broadcasting Companies, Inc.

/s/
Vice-President, Program Planning

NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION

/s/
Executive Director

The undersigned hereby guarantees the faithful performance by ABC Sports, Inc., of all monetary obligations under the foregoing contract.

AMERICAN BROADCASTING
COMPANIES, INC.

By /s/
Vice-President and Chief
Financial Officer

As of August 12, 1977

PLAINTIFFS' EXHIBIT 76

The National Collegiate Athletic Association

President
J. NEILS THOMPSON
University of Texas
Austin, Texas 78758

Executive Director
WALTER BYERS

Secretary-Treasurer
EDGAR A. SHERMAN
Muskingum College
New Concord, Ohio 43762

August 19, 1977

Mr. Wayne Duke, Commissioner
Big Ten Conference
1111 Plaza Drive
Schaumburg, Illinois 60195

Dear Wayne:

I am enclosing copies of letters that the chancellor of the University of Mississippi has written to Senator Eastland in an effort to stimulate Justice Department action in response to the NFL's encroachment upon the Congressional mandate for protection of high school and college football games.

The Justice Department's rationale in exempting the unused games (i.e., the games which the NFL decides not to use in its package and thus returns to the clubs for sale) defies any reasonable logic in interpreting pooling or monopoly arrangements under antitrust statutes. Our purpose, however, is not to argue the legal issues in this letter.

It is clear that the NFL, now conscious of the Justice Department's inaction, is exploiting this loophole. Your Committee apparently has been holding meetings with NFL representatives and I gather there is a euphoric aura of cooperation surrounding these discussions. I feel that the NFL attitude in this instance is outrageous and the next time your group is in communication with the NFL, I think that any cooperation should be contingent upon the threshold requirements that the NFL cease its exploitation at the expense of high school and college football.

Unless Chancellor Fortune's contacts with Senator Eastland prompt the Justice Department to enforce the Congressional law, I believe this issue will erupt into a concerted campaign by the schools and colleges to discredit the NFL's motives and to obtain whatever Congressional or legal redress may be available to us.

Cordially yours,

Walter Byers

WB:ll
Enclosures
cc: Mr. Brice B. Durbin
NCAA Professional Sports Liaison Committee
NCAA Television Committee
bcc: Mr. Thomas C. Hansen
Mr. Rickard Pfizenmayer

PLAINTIFFS' EXHIBIT 60

The National Collegiate Athletic Association

President
J. Neils Thompson
University of Texas
Austin, Texas 78758

Executive Director
Walter Byers

Secretary-Treasurer
Edgar A. Sherman
Muskingum College
New Concord, Ohio 43762

TH | In all such communications, important to make point Meet (B,13C) These are recs. for Bd's consideration or you are confirming your understanding as to what ABC plans to do.

September 21, 1977

Mr. James R. Spence
ABC Sports, Incorporated
1330 Avenue of the Americas
New York, New York 10019

Dear Jim:

no need to retract this one.

Here, as promised, is a breakdown of the dollars and procedures for the regular-season telecasts of the games of members of Divisions II and III for the 1977 season.

B 9/24

First, the money: $50,000 has been added (to be taken off the top of the $18 million) to cover the production costs and rights fees for the games in 1977. This leaves $540,000 payable as rights fees for the Division II and Division III championship telecasts.

Second, legal aspects: The Committee would appreciate ABC adding to its Division II-III contracts a requirement that the monies payable to the home team are to be divided on the following bases:

For Division II games, a 50-50 split between the host and visiting teams.

For Division III games, a 60-40 split with 60 per cent going to the host institution and 40 per cent to the visiting institution.

Third, the Committee and Council have agreed to authorize to present a third Division II telecast if it wishes to do so, with ABC to pay the production costs of the third such contest only. The portion of the $200,000 remaining after payment of the production costs for the other four games would be spread across the five telecasts as rights fees.

Obviously, due to several factors, it will be impossible for you to specify actual rights prior to the conclusion of the four or five telecasts.

The Council and Executive Committee also voted to restrict appearances in those telecasts to teams eligible for the Division II and Division III playoffs (except one of the institutions moving to Division I classification for 1977 still would be eligible under the terms of the Plan if it was eligible in 1976). Our records indicate five institutions are affected for 1977: University of Nevada, Las Vegas; Florida A&M University; Texas Southern University; Jackson State University and University of Tennessee, Chattanooga.

I believe this covers all aspects of these telecasts. Please let me know if you have any questions.

Best wishes.

Cordially yours,
/s/ Thomas C. Hansen
Thomas C. Hansen
Television Program Director

TCH:nlm
cc: Captain John O. Coppedge
Mr. Robert A. Latour
Mr. Stan Sheriff
Mr. William C. Stiles

PLAINTIFFS' EXHIBIT 28

FOR COMMUNICATIONS CENTER

DOMESTIC/WORLD-WIDE TELEGRAM
CLASS OF SERVICE
STRAIGHT
SEE REVERSE SIDE
TWX/TELEX or ZIP NUMBER
10/30/78 SPORTS 160-001
DATE—SENDERS DEPARTMENT—COST CENTER

TO: MR. ARNIE FERRIN
- ATHLETIC DIRECTOR
- UNIVERSITY OF UTAH
- SALT LAKE CITY, UTAH 84112

DEAR MR. FERRIN:

WE HAVE SELECTED THE GAME BETWEEN YOU AND UNIVERSITY OF NEW MEXICO SCHEDULED FOR SATURDAY, NOVEMBER 4, 1978 AT SALT LAKE CITY, UTAH AS ONE OF THE REGIONAL GAMES TO BE TELECAST AS PART OF THE 1978 SERIES OF NCAA FOOTBALL TELEVISION BROADCASTS. OUR TELECAST OF THIS GAME HAS BEEN APPROVED BY THE NCAA. WE UNDERSTAND THAT KICK-OFF WILL BE AT APPROXIMATELY 2:10 MST. IN ACCORDANCE WITH OUR AGREEMENT WITH THE NCAA AND THE NCAA RULES, WE REQUIRE YOUR CONFIRMATION OF THE FOLLOWING:

1. THE STARTING TIME OF THE GAME;

2. YOUR CONSENT AND THE CONSENT OF THE VISITING TEAM (WHICH YOU MUST OBTAIN) TO OUR TELECAST OF THE GAME; AND

3. YOUR ACCEPTANCE OF $401,222.00 AS TOTAL PAYMENT TO YOU FOR OUR TELECAST RIGHTS. THE FOREGOING AMOUNT IS INTENDED TO COVER ANY PAYMENT REQUIRED BY THE VISITING TEAM FOR OUR TELECAST. YOU WILL BE RESPONSIBLE FOR MAKING ALL ARRANGEMENTS WITH THE VISITING TEAM AND FOR ANY SUCH PAYMENTS TO THEM.

UPON RECEIPT OF YOUR WIRE CONFIRMING YOUR AGREEMENT TO THE ABOVE, INCLUDING THE STARTING TIME AND PAYMENT SPECIFIED, A MORE FORMAL AGREEMENT WILL BE FORWARDED TO YOU. A PROMPT TELEGRAPHIC REPLY WILL BE APPRECIATED.

VERY TRULY YOURS,

ABC SPORTS, INC.

CHARLES STANFORD
DIRECTOR, LEGAL & BUSINESS AFFAIRS

bcc: Messrs. Apter, Arledge, Bernstein, Howard, Levy, Martin, Smiley, Spence and Weiner
Ms. Sacks

PLAINTIFFS' EXHIBIT 29

FOR COMMUNICATIONS CENTER

DOMESTIC/WORLD-WIDE TELEGRAM
CLASS OF SERVICE
STRAIGHT
SEE REVERSE SIDE
TWX/TELEX or ZIP NUMBER
11/6/78 SPORTS 160-001
DATE-SENDERS DEPARTMENT-COST CENTER

TO: MR. ROBERT DEVANEY
- ATHLETIC DIRECTOR
- UNIVERSITY OF NEBRASKA
- LINCOLN, NEBRASKA 68588

DEAR MR. DEVANEY:

WE HAVE SELECTED THE GAME BETWEEN YOU AND UNIVERSITY OF OKLAHOMA SCHEDULED FOR SATURDAY, NOVEMBER 11, 1978 AT LINCOLN, NEBRASKA AS ONE OF THE NATIONAL GAMES TO BE TELECAST AS PART OF THE 1978 SERIES OF NCAA FOOTBALL TELEVISION BROADCASTS. OUR TELECAST OF THIS GAME HAS BEEN APPROVED BY THE NCAA. WE UNDERSTAND THAT KICK-OFF WILL BE AT APPROXIMATELY 12:00 NOON CST. IN ACCORDANCE WITH OUR AGREEMENT WITH THE NCAA AND THE NCAA RULES, WE REQUIRE YOUR CONFIRMATION OF THE FOLLOWING:

1. THE STARTING TIME OF THE GAME;

2. YOUR CONSENT AND THE CONSENT OF THE VISITING TEAM (WHICH YOU MUST OBTAIN) TO OUR TELECAST OF THE GAME; AND

3. YOUR ACCEPTANCE OF $533,600.00 AS TOTAL PAYMENT TO YOU FOR OUR TELECAST RIGHTS. THE FOREGOING AMOUNT IS INTENDED TO COVER ANY PAYMENT REQUIRED BY THE VISITING TEAM FOR OUR TELECAST. YOU WILL BE RESPONSIBLE FOR MAKING ALL ARRANGEMENTS WITH THE VISITING TEAM AND FOR ANY SUCH PAYMENTS TO THEM.

UPON RECEIPT OF YOUR WIRE CONFIRMING YOUR AGREEMENT TO THE ABOVE, INCLUDING THE STARTING TIME AND PAYMENT SPECIFIED, A MORE FORMAL AGREEMENT WILL BE FORWARDED TO YOU. A PROMPT TELEGRAPHIC REPLY WILL BE APPRECIATED.

VERY TRULY YOURS,

ABC SPORTS, INC.

CHARLES STANFORD
DIRECTOR, LEGAL & BUSINESS
AFFAIRS

bcc: Messrs. Apter, Arledge, Bernstein, Howard, Levy, Martin, Smiley, Spence and Weiner
Ms. Sacks

PLAINTIFFS' EXHIBIT 10

The National Collegiate Athletic Association

President
J. Neils Thompson
University of Texas
Austin, Texas 78712

Executive Director
Walter Byers

Secretary-Treasurer
Edgar A. Sherman
Muskingum College
New Concord, Ohio 73762

December 26, 1978

Mr. James R. Spence Jr.
Senior Vice President
ABC Sports, Incorporated
1330 Avenue of the Americas
New York, New York 10019

Dear Jim:

George Gangwere has reported to me on the meeting he held with counsel for ABC on December 7 in Washington, D. C.

It seemed ABC's primary objective was for the NCAA to commit itself to going to the Congress of the United States seeking a statutory antitrust injunction for the NCAA Television Plan.

As I believe I indicated to you previously, the timing for this type of action is not particularly good. Senator Kennedy has just replaced Senator Eastland as chairman of the Senate Judiciary Committee and is known to be looking for areas in which antitrust action can be taken. It is unlikely, therefore, he would entertain as one of the first items of business of his committee the granting of an antitrust exemption. Further, in the House, Congressman Santini of Nevada will be seeking for the foreseeable future to attach to any pertinent legislation an amendment which would force the NCAA to restructure its enforcement program into a full judicial process. This would be unworkable from the standpoint of required financial and time commitments, and thus would render the enforcement program virtually ineffective.

RECEIVED JAN 3 1979 CHARLES A. SMILEY, JR.

For these reasons and others, it seems inappropriate to me for ABC to hold out such action by the NCAA as a quid pro quo for ABC's approval of the revised Articles 16 and 20 of the 1978-1981 Football Television Plan. Frankly, the attitude strikes me as coersive, but equally important, the timing is unfortunate and inappropriate.

We believe we have created a reasonable approach to the regulation of cablecasting through the addition of the new Articles 16 and 20. If ABC has any alternate plan, we would be pleased to consider it. However, in the absence of an alternate approach and ABC's agreement, the NCAA would have little recourse except to withdraw approval for additional telecasts of Ohio State football by Warner Communications, which certainly would bring a new legal action from Warner and a court test of the plan. There appears to be little merit to that chain of action.

George indicated ABC suggested that the first right of the network to present an exception telecast, as set forth in Article 16, page 20, of the plan, should not require a telecast "via its affiliated station." I can understand the objection, but, of course, it was not the intent of the committee to limit ABC to an affiliate as the word is used in the television industry, but rather to any station with which your network might be associated. We would be pleased to eliminate the phrase "via its affiliated station" and Walter has forwarded a letter to that effect.

It is the plan of the Television Committee to meet again February 20-21 in Kansas City and we invite you to attend at

that time to continue discussion of the acceptance by ABC of Articles 16 and 20. Meanwhile, I state again for the record that as of this time the NCAA is administering its program under the provisions which are contained in the newly printed plan.

Best wishes.

Cordially yours,
/s/ Thomas C. Hansen
Thomas C. Hansen
Television Program Director

TCH:nlm

cc: Mr. Richard Andrews
Mr. Roone Arledge
Mr. Walter Byers
Mr. Cecil N. Coleman
Captain J. O. Coppedge
Mr. George Gangwere
Mr. Charles W. Smiley

PLAINTIFFS' EXHIBIT 11

ABC Sports, Inc. 1330 Avenue of the Americas New York, New York 10019
Telephone 212-LT1-7777

James R. Spence, Jr.
Senior Vice President

Dear Walter:

I am writing with regard to your letter of December 20 and Tom Hansen's letter of December 26 to me concerning possible changes in the 1978-1981 NCAA Football Television Plan. Please excuse my delay in getting back to you.

We are willing to discuss with you and your colleagues possible changes in articles 16 and 20 of the Plan, which is part of our June 10, 1977 agreement; however, we are both surprised and disturbed at your distributing to the NCAA membership a version of the 1978-1981 Plan--and your taking the position that this Plan is the one under which the NCAA is currently operating--when the distributed Plan contains language unilaterally adopted by the NCAA and not agreed to by ABC Sports. This language speaks to the very essence of our agreement with the NCAA.

We have not made congressional protection a prerequisite for our approval of revisions of the Plan; however, we have and do strongly urge the NCAA to entertain such a course of action.

The Warner Cable, Columbus, Ohio settlement was accomplished as a single exception to our exclusivity with the concurrence of the NCAA. What you are not proposing-- the application of the specific procedure and circumstances of the Warner Cable settlement to all cable-casts occurring through the balance of our agreement-- is a basic issue which needs thorough discussion and resolution by the principals of our respective organizations. To that end, we are ready to fix a mutually convenient date and location.

RECEIVED JAN 18 1979 CHARLES A. SMILEY, JR.

Once we have had the meeting which we have been proposing, I am sure that we can then expeditiously agree on and finalize any necessary language revisions.

Regards,

/s/ James Spencer Jr.

Mr. Walter Byers
Executive Director
National Collegiate Athletic Assoc.
P.O. Box 1906
Shawnee Mission, Kansas 66222

January 18, 1979

JRS:mc

cc: Messrs. Arledge, Stanford

cc: Mr. Cecil Coleman
Director of Athletics
University of Illinois

Captain John O. Coppedge
Athletic Director
U.S. Naval Academy

George Gangwere, Esq.
Swanson, Midgley, Eager
Gangwere & Thurlo

Mr. Thomas Hansen
Television Program Director
National Collegiate Athletic Assoc.

PLAINTIFFS' EXHIBIT 98

CBS MEMORANDUM

FROM: Kevin O'Malley
TO: VAN SAUTER
DATE: February 20, 1981

RE: MEETING WITH NCAA REPRESENTATIVES ON COLLEGE FOOTBALL

There are several aspects of our meeting with the NCAA Television Committee on Wednesday in Kansas City which we should discuss. First—some background:

1. *The Purpose of the Meeting*—Each time the NCAA has approached a new football contract, they have conducted conversations with representatives from the networks on the status of televised college football, and elicited interest in the package from each network. On Wednesday and Thursday, all three networks plus ESPN, USA Network and "ON" TV will make themselves available with suggestions about the package and answer the Committee's questions.
2. *Changing The Package*—The NCAA has always had a single network package, which has been carried at various times by all three networks, and has been on ABC for the past fifteen years. The current package, a four-year deal, expires with the 1981 season. ABC pays $29.5 million per year, and loses money—how much is debatable. The ratings have been flat in the 11-11.5 area for several years. At the time the last package was sold, consideration was actively given by some of the Committee to splitting it between two networks. This proposal was ultimately defeated when ABC agreed to a 66%

jump in rights to keep its exclusivity. No bids were actually taken from the other networks, partly because this jump in rights was sufficient to keep the Committee lined up behind Walter Byers, who opposed the two-network idea. His stated reason was the loss of control the NCAA would experience from the "dilution" of their contract. Walter has always been close to ABC, and it is suspected that his preference is based upon other than purely pragmatic reasons.

Now, after three more years of the status quo, there is a somewhat more widely-held view in college athletics that the two-network idea should be tried. The new College Football Association, made up of the larger schools, has pressed for its consideration, and many people in college football want it because:

a. The multiple network idea has made pro football visable and prosperous, and the NCAA teams in large markets are buried by the pros.

b. Their ratings are flat and rurally-based.

c. ABC under-promotes college football, a more pronounced trend since they got in the baseball business.

d. They see ratings growth as the best way to assure future financial gains.

It is assumed that ABC will once again pay a premium to keep exclusivity, and moan that the loss of same will drastically weaken their advertiser support.

3. *Why We Should Appear*—Our present level of interest could probably be described as limited, or less. Much of that attitude stems from the financial problems inherent in making a major unprofitable

commitment, as well as the undesirability of pre-empting some existing programs, and seeking additional affiliate time. With those negatives in mind, we should still make an appearance for the following reasons:

a. Not to do so might damage our remaining chances for the basketball championship.

b. If we don't get the championship, our interest in college football might be reassessed.

c. Whatever its problems, this series is still, next to its pro cousins, the highest-rated live sports series in television.

d. Any stated interest we exhibit in college football is conditional on a limited, sound, and financially feasible NCAA proposal.

e. The affiliate and pre-emption problems may not be too severe—we should discuss.

KMO/ss

PLAINTIFFS' EXHIBIT 40

DOMESTIC/WORLD-WIDE TELEGRAM

FOR COMMUNICATIONS CENTER

STRAIGHT-FULL RATE

PLEASE COPY PARTIES LISTED ON
THE ATTACHED ALSO BY TELEGRAM

7/20/81 ABC SPORTS 160-001

MR. WALTER BYERS
EXECUTIVE DIRECTOR
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
U.S. HIGHWAY 50 AND NALL AVENUE
SHAWNEE MISSION, KANSAS 66222

DEAR WALTER:

IT IS INCONCEIVABLE TO US THAT WE COULD ENTER INTO AN AGREEMENT WITH THE NCAA AT THESE EXTRAORDINARY LEVELS FOR A SPLIT NETWORK FOOTBALL PACKAGE THAT IS DESIGNED FOR PARITY WITHOUT GUARANTEES THAT WE WILL NOT BE REQUIRED TO PAY MORE THAN ANOTHER NETWORK FOR THE SAME PACKAGE.

I CERTAINLY HOPE THAT YOU WILL NOT CAUSE OUR SIXTEEN CONSECUTIVE YEAR RELATIONSHIP, WHICH HAS BEEN ONE OF THE MOST ENDURING AND MUTUALLY SATISFYING IN THE HISTORY OF TELEVISED SPORTS, TO COME TO AN END OVER WHAT WE CONSIDER TO BE AN ABSOLUTELY VITAL AND REASONABLE NEED ON OUR PART FOR ANY FUTURE TWO NETWORK RELATIONSHIP.

ROONE ARLEDGE

PLAINTIFFS' EXHIBIT 16

STRAIGHT-FULL RATE
TELEGRAM: SHAWNEE MISSION, KANSAS 66222
1/29/82 ABC SPORTS 160-001

JANUARY 29, 1982

TO: WALTER BYERS
EXECUTIVE DIRECTOR
NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION
U.S. HIGHWAY 50 & NALL AVENUE
SHAWNEE MISSION, KANSAS 66222

DEAR WALTER:

WE UNDERSTAND THAT RIGHTS TO THE NCAA FOOTBALL "SUPPLEMENTARY SERIES" HAVE BEEN ACQUIRED BY THE TURNER BROADCASTING SYSTEM. THERE IS A DISTURBING REPORT THAT IN ADDITION TO DISTRIBUTING THE SUPPLEMENTARY SERIES GAMES VIA SATELLITE FOR CABLE TELECAST, TURNER PLANS TO BROADCAST THE GAMES LIVE OVER WTBS IN ATLANTA.

THE UNDERLYING PRINCIPLES OF OUR AGREEMENT FOR THE 1982 THROUGH 1985 SEASONS AND THE BASIS FOR OUR $131,500,000 COMMITMENT IS THAT ASIDE FROM THE BROADCASTS BY THE CARRYING NETWORKS AND THE "EXCEPTION TELECASTS" BY LOCAL STATIONS PURSUANT TO ARTICLE 16 OF THE TELEVISION PLAN, THERE WILL BE NO OTHER LIVE COVERAGE OF COLLEGE FOOTBALL ON "FREE" OVER-THE-AIR TELEVISION. THE NCAA FOOTBALL TELEVISION PRINCIPLES FOR 1982 THROUGH 1985 AND OUR AGREEMENT CLEARLY STATE THAT THE SUPPLEMENTARY SERIES WILL INVOLVE TELECASTS ONLY OVER *CABLE* AND/OR *PAY* OVER-THE-AIR TELEVISION.

bcc: Messrs. Arledge, Lavery, Stanford
Ms. Sundberg

WTBS IS A "FREE" OVER-THE-AIR UHF STATION. IT IS RECEIVED BY ALL ATLANTA-AREA VIEWERS WITHOUT CHARGE. IF THE NCAA ALLOWS THESE LIVE COLLEGE FOOTBALL TELECASTS BY WTBS, IT WILL CLEARLY BE IN BREACH OF OUR AGREEMENT AND WILL CAUSE VERY REAL AND SUBSTANTIAL INJURY NOT ONLY TO ABC BUT TO OUR ATLANTA-AREA AFFILIATES. WE WOULD APPRECIATE YOUR IMMEDIATE CONFIRMATION THAT THE CLEARLY ENUNCIATED PROVISIONS OF OUR AGREEMENT AND THE TELEVISION PRINCIPLES WILL BE ADHERED TO AND THAT THERE WILL BE NO LOCAL "FREE" OVER-THE-AIR BROADCASTS OF COLLEGE FOOTBALL IN ATLANTA OTHER THAN PURSUANT TO THE AGREED-UPON EXCEPTION TELECAST PROVISIONS OF ARTICLE 16 OF THE PLAN.

VERY TRULY YOURS,

JAMES R. SPENCE, JR.

JRS:mc

cc: George Gangwere, Wiles Hallock, Tom Hansen

No. 83-271

Office - Supreme Court, U.S.
FILED
DEC 1 1983
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX: VOLUME II

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PETITION FOR CERTIORARI FILED AUGUST 13, 1983
CERTIORARI GRANTED OCTOBER 17, 1983

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On Plaintiffs' motion for a preliminary injunction, before the Honorable Luther B. Eubanks, District Judge, September 17, 1981, and September 18, 1981.

[36][1] **FRED C. DAVIDSON,**

the witness, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please, sir? [37] A. Fred C. Davidson.

Q. Where do you live, Mr. Davidson? A. Athens, Georgia.

Q. What is your business or profession? A. President of the University of Georgia.

* * *

[40] Q. All right, sir. From your perspective how does the athletic program and the academic program and the growth of your university, how do they impact on each other? A. Well, they impact in a sense directly and they impact on a much larger sense indirectly. Certainly directly, because our athletic program sponsors all of those scholarships, and many of them in band and other things. It's one of the major givers of scholarships. And in Georgia where you can have no gratuities we have to pay for out of state and everything, so it impacts directly that way.

---

[1] Page references are to the hearing transcript, trial transcript and deposition transcripts. Correction of transcription errors and deposition changes have been made by agreement.

But the major influence is that today's universities are different. When I was there the University had forty-five hundred people in it, everyone knew each other, there was a sense of community that was built around the University. Today universities are federations of schools [41a] and colleges and in our sense thirteen. We're an institution that has a peculiar situation, we limit our freshmen input, we're larger in the middle than we are at the bottom, meaning that we have a lot of transfers that come in at the junior level, proven students. They move directly into upper division work, major work and that's where their loyalty lies.

Athletics and primarily football at the University is the one focal point that gives cohesion to all of our members, both students and alumni, it brings them back home, it's a kind of celebration in which we all have a common cause. So psychologically it has great impact, and it's not just on the alums, it creates a sense of pride on the part of the people of the state of Georgia. We recognize that's a responsibility, too.

So while we keep them totally separate as far as funding is concerned and everything else, there's no way to pull them apart as far as the effect on the life of the University, the community, its state.

Q. How does it affect your giving programs to the University? A. Well, there's no way to say precisely. We know instinctively however that it has quite an effect.

Q. Have you observed other universities that have deemphasized, for example — A. Oh, yes, I don't think there's any doubt. There [42] are several in our part of the country, and this is anecdotal, I mean, I don't know that I can particularly justify it, but we went through a period in which I remember North Carolina deemphasized football. Duke deemphasized football. It was not long before they were both deeply involved again because one public and one private, they simply were not keeping the attention of their sponsoring

society, it was important to them. And they are back in it now just like we are trying to be competitive.

• • •

[46] Q. All right. Now, did the CFA take any action in [47] regard to this TV study that they came up with? A. Did the CFA?

Q. Yes, sir. A. Well, that evolution, later witnesses I'm sure can track it much more precisely than I can. Our initial concern was as I said, over increased costs, over limited income, over lowered ratings and whether indeed in the best sense of a good judgment, television was being properly used as a source of income.

That study showed us that indeed it was not in our opinion, we shared that with the NCAA. That study came on — it was offered to our people I think two years ago for consideration, the study committee was kept intact, we have kept the NCAA informed of this.

At this last meeting in June we notified the NCAA that indeed we felt several things, that our property rights were ours, that the interpretation that they had come out with in April based on their knowledge of which we had not hidden in any way that we were continuing to explore television, that said we couldn't do that, that we didn't agree with that and that indeed we at that time as a group of institutions told them that in our opinion they did not have the right to negotiate our property.

From there we charged this committee to explore or back during the time to explore the feasibility of our [48] finding another carrier.

And through all of this there's one thing that I think is extremely important to my way of thinking and I think the minutes will show, that at any time this was discussed it was always couched in the way that what we were doing in the CFA

was offering an option to our membership. Membership in CFA was never contingent and still isn't accepting any plan that CFA offers. But we felt with television in the shape it was that our member institutions should be able to look at the plan offered by the NCAA, look at the plan that our committee could get and take the one that was best for their institution.

Now, we are still at this date in a position of not even seeing the NCAA plan.

THE COURT: Have any demands been made by you or any others that you know of to see it?

THE WITNESS: Well, yes, absolutely. We have asked in fact at our meeting in August of this last month in Atlanta, we asked the NCAA to come with all of the pertinent documents so that our people could look at what they had negotiated and what we have negotiated and take what was best for the institution.

Now, we have been told through all of this, and there's been coercion, I mean, there have been threats that indeed if you go with this you're going to lose all of your [49] possibilities and your other sports. And yet we have not been able as an institution, my institution, to sit down and make a choice between two contracts.

Q. (By Mr. Coats) Now, in the convention you were presented a contract with NBC, were you not? A. Yes, sir.

Q. And I believe we will show a little later that that was affirmatively adopted by the CFA at that convention? A. That's correct.

Q. And there was an opt out provision under the contract, that you adopted it and then later on had the opportunity to withdraw; is that correct? A. By the 10th of September, the original date.

Q. Yes. A. In fact, the way it was set up was we told our membership, and we asked by the way, we asked NCAA to

come and present their plan to us, and Wiles Hallock came, but he didn't have the plan, he didn't have a contract, we had ours in detail.

Our arrangement with our membership was that if a majority opted to the CFA plan that everyone would be bound to that plan on the 10th of September unless they opted out, but anyone could opt out whether they had voted for it or against it, they could opt out. And at that period then NBC would be able to look at the inventory of schools and say [50] this is a satisfactory inventory or it's not a satisfactory inventory or it has to be renegotiated.

It was at that time that there was a tremendous amount of confusion introduced in this. You know, it's really not as simply as saying if you don't like NCAA you can get out, it really just isn't that simple. But the threats of retaliation in letters saying that we will expedite, I mean, letters saying we will expedite enforcement procedures against you.

Q. If you stay with the contract? A. If you stay with the contract. Now, we did —

Q. Excuse me, how did that impact on the other CFA schools? A. Well, it has a chilling effect. All of our folks aren't primarily football schools, some of them are primarily basketball schools even though they're in the CFA.

Now, the threat to many presidents of having their basketball disrupted at the national level because of an action they took on a football contract can't have anything except a chilling effect and it did and it still does.

Q. Now, we're down till tomorrow where you have to make a decision, you as the chief executive officer of Georgia have to make a decision about whether to opt out of the contract that was approved by the CFA in August; is that correct? [51] A. Yes, sir.

Q. What sort of dilemma does that place you in? A. An impossible one right now.

Q. Tell the Court why, please? A. Judge, I have no problem with knowing where my responsibilities are. My responsibilities are the people of the state of Georgia, they are to the young people that come to that institution for the best education possible, they are also to the young athletes who have come there that we ask to come to provide for them an environment in which they can compete at the highest possible level that their talent will take them, national championships.

I also have no problem with understanding my responsibility to the banks that hold the eleven and a half million dollars worth of notes on the stadium that has to be retired out of private funds, nor to the promises I have made to the women athletes that we would continue to sponsor programs of national significance for them as long as the football team can keep generating the money.

What I have is a tremendous doubt as to where my authority lies right now. I do all of this based on the income that comes out of the football team. If I take a certain action concerning that football team, I jeopardize the opportunity for all of these other scholar athletes that we have, and as I said, we were third in tennis, sixth in [52] golf and ranked in track.

On the other hand I have this problem. And this has only come to bother me lately, and I think this is a danger, and I hope I'm not philosophizing. I think there's a real danger that we're looking to the called meeting of the NCAA to solve too many questions. I think we are not dividing the issues.

I am thoroughly pleased with the fact that the NCAA is going to call a convention to look at the reorganization. We have been fighting for that for years. We may even get it this time. But that doesn't, that still doesn't answer the dilemma that I face concerning my property rights, one is governance, one is business. Now, I mean, my own thinking leads me to see right now, can anyone guarantee me immunity if indeed we all get together and embrace each other in December and say, by

golly, we're all going to come back together and we are going to control television. Now, does that make me party to a conspiracy to either form or continue a monopoly? I mean, to me that's a very — that's a personal question and an institutional question.

I think what's really happened that concerns me the most is that NCAA as I watched over the last 15 years has moved from its concern over academic performance, over eligibility, over recruiting, over rules that have to do [53] with the quality of the game and they have gradually moved into business. And the great danger I see today is that apparently to them the business end of it is more important than the other end of it.

So I am left in the shape of saying, I guess, I heard this morning that all I have to say is, well, get out if you're worried about your liability. If I do that I fall back on my promises to an awful lot of young folks, and you absolutely can't just step out and set up a series of championships.

I see no reason why the University of Georgia should have to get out of the NCAA. I see no reason why the University of Georgia shouldn't remain master of its own fate as far as its business operations are concerned.

I am thoroughly convinced of one thing, the first payment I miss on that stadium, NCAA is not going to come pay it off.

Q. All right, sir. Now, do you consider that you are under threat of sanctions? A. Yes, sir.

Q. That if you indeed fail to opt out tomorrow or if the University of Georgia appears on the list that goes from CFA to NBC, can you tell us if it's been indicated to you that sanctions will be forthcoming? A. It's my understanding and I have heard it said [54] directly in meetings of the CFA by representatives of NCAA.

Q. That what? A. That if our name appears on that list proceedings will be taken against us.

Q. And what could those proceedings involve? A. They could involve our loss of the right to participate in any of the sports in which we're involved in with the NCAA, that's my understanding.

Q. And yet you believe I take it that the CFA contract is much more favorable to the University of Georgia than the NCAA one is? A. I think it's more favorable to all of our membership, not just on a dollar amount, but on appearances, and I think appearances many times are overlooked as being just as important as dollars that come in as far as exposure, particularly to some of our less successful schools.

Q. All right. Now, Dr. Davidson, did you by written document or by anything of that kind cede your rights to television football to the NCAA? A. No, sir.

Q. What position did the CFA take in regard to the NCAA interpretation? Did you consider that at your convention? A. Yes, we did. We took the position that we disagreed with the official interpretation, and that we also [55] have on at least two occasions told them that they did not have the right to negotiate our property at least without our consent, which they did not have.

• • •

[57] *Cross Examination by Mr. Andrews:*

Q. May it please the Court, Dr. Davidson. Going back to the purposes for the organization of the CFA, was the consideration of NCAA football television policy one of the original purposes for which the CFA was formed? A. No, sir, at least not to my knowledge it wasn't. And I was at every founding meeting. It may have been mentioned early as a concern through the NCAA, but it was not mentioned as a —

Q. It wasn't stated as a purpose in the original articles of the association? A. No, sir.

Q. When did the CFA commence its football television [58] study? A. You would have to ask one of the later witnesses specifically, I can't remember, it was maybe two, three years ago.

• • •

[59] Q. In the convention which you refer to which was held in June, June or July of 1980, was that a CFA convention? A. Yes, it was.

Q. And it was at that convention that the membership of the CFA first considered this television study? A. I'm really not sure. My impression is it was the first time the membership, not the board, considered where that study stood.

Q. How much earlier than that had the CFA board considered the television study? A. Probably nine months or so.

[60] Q. Would that have been prior to January of 1980? A. I don't remember, you'll have to get that chronology from someone more closely involved.

Q. Has the CFA ever brought since 1979, let's say, either at the annual convention of the NCAA in 1980 or any other convention of the NCAA, any legislation concerning football television to the floor of the NCAA? A. Not to my knowledge. We have acted in that case as we have in most in sharing our concerns with the structure of the NCAA and its television committee.

Q. I take it from what you said you have not gotten the satisfaction as far as the CFA members are concerned with the 1.6 rule or the 2.0 rule, the academic standard so to speak? A. Certainly I expressed my own opinion and my perception of my colleagues' opinions that that's true.

Q. Is that involved also with the restructuring of Division 1-A of the NCAA so that possibly Division 1-A, the football

schools at least, could set their own academic standards for the sport of football? A. That is one of the areas in which restructuring would do benefit. Once again though I want to separate that issue from the property rights issue.

Q. But those issues are all the ones which ultimately could be affected by restructuring the Division 1-A of the [61] NCAA if it takes place? A. Yes, it could have been affected five years ago had it taken place.

Q. And the CFA would have liked to have seen it five years ago instead of this December or sometime in the future? A. Yes.

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[87] Q. Can you explain how we're going to take you and the other 60 members of the CFA out of business, sir? A. Certainly. It's not going to bother me, we're not a particularly big basketball school, but we have schools that are. And even the threat of sanctioning their basketball programs because of an action taken over the football program would absolutely jeopardize the job of some presidents.

Q. Isn't it true that if the 61 members of the CFA establish their own basketball tournament they would have the heavy majority of the finalists, the semi-finalists and the quarter-finalists in all the NCAA basketball tournaments going back twenty-five years or more? A. No question about that, but there are a lot of things that go other than having tradition. It's a fact that we don't want to be in a situation where the Marquettes and everyone else are limited. And you may say that it's very easy to do that, I doubt if it's very easy. To get out and start a competing tradition in basketball tournaments, I think the NCAA basketball tournament is great, I'm not [88] opposed to it at all, I don't see why I should be forced out of it.

Q. I understand that you would prefer to compete in the NCAA basketball tournament, but there isn't anything legally

preventing you from doing that, is there? A. Legally preventing me from what?

Q. Setting up your own CFA basketball tournament and conducting a basketball tournament? A. I assume there probably is, we're a member of the NCAA.

Q. All right. But if you're not, there's nothing preventing you from withdrawing from the NCAA and doing that tomorrow, is there? A. I would assume not.

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[92] **WILLIAM S. BANOWSKY,**

the witness, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Ward:

Q. May it please the Court, Dr. Banowsky, will you please state your full name for the record? A. William S. Banowsky.

Q. Where do you presently reside? A. Norman, Oklahoma, Pickard and Lindsay.

Q. What is your occupation, sir? A. I am President of the University of Oklahoma.

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[95] Q. Are you aware of the fact that the NCAA has negotiated the television broadcast package for intercollegiate football on behalf of the University of Oklahoma for a number of years? A. Yes, sir.

Q. Did the University specifically delegate this negotiating function to the NCAA? A. No, sir.

Q. To your knowledge how did the NCAA acquire that negotiating right? A. Well, I don't know, except my guess, my

assumption would be that it sort of grew through the years. There was [96] a time when there was no television of football games and yet the NCAA has a grand tradition which we all celebrate and appreciate. So we were members, and then television became important and some of the universities developed very distinguished athletic programs, and I think the NCAA assumed this right.

We grew so profoundly uncomfortable with their assumption of these rights and other attitudes on the part of the NCAA that that led to the formation of the College Football Association a number of years ago.

Q. Is the University's membership in the NCAA voluntary or compulsory as you understand it, sir? A. We regard it as a compulsory organization. We don't see how we would be able to field and maintain an intercollegiate program without the requirement of being members of the NCAA.

Q. During his opening statement, counsel for the NCAA suggested the University of Oklahoma would be free to do its own thing and withdraw from the NCAA if it so chose. Based on your background and experience in higher education, do you share that view, sir? A. No, I share the view with President Davidson that the chief executive officers of these universities have an extremely difficult, very anxiety-producing responsibility now because we're being called upon to try [97] to make decisions when we don't know what the outcome may be.

I should think it would be highly risky to the young people who participate in the seventeen sports at the University of Oklahoma if we were to reach the decision that we simply leave the NCAA. We don't know what the outcome would be. We don't know how they might be punished and generations that might follow them.

And I suppose I would say maybe distinguished counsel who regards that as an easy kind of thing to do might also consider leaving the Bar Association. I suppose one doesn't

have to be a member of the Bar Association. We don't have to be a member of the NCAA, but if one wishes to practice law, one has to be a member of the Bar Association. If we want to play football, we have to be a member of the NCAA.

They told us if we don't play football by abdicating our property rights, they not only will execute sanctions against our football program but all of the other sports as well.

Q. Do you believe these statements, sir? A. Well, I suppose in my responsibility one has to take seriously every kind of statement made with that potential disastrous impact.

Q. Is it the University of Oklahoma's desire to retain its status as a member in good standing in the NCAA? [98] A. Absolutely. I would like to be as forceful as I can in expressing our appreciation for very much of what the NCAA does. As I have said, it has a long and celebrated tradition. We want to be in that fellowship. We not only support but we join President Davidson in urging that the NCAA continue to have even more exacting standards academically for athletes.

We feel like the regulatory activities of the NCAA in terms of being sure that the sports are played fairly and that the academic standards are met are not only in order but also necessary.

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[99] Q. Will you please tell this Court why if it is the desire of the University of Oklahoma to retain its status as a member in good standing the University of Oklahoma is joined in this lawsuit? A. Well, we did that frankly with fear and trepidation knowing that we had been threatened with sanctions, and although nobody has told me so because I join President Davidson in having never heard from the NCAA, never having seen a contract and all the rest. I was hearing rumors from all my colleagues that we might even be expelled from the NCAA.

It was a very difficult decision for the Board of Regents of the University of Oklahoma to decide to file this suit in this Court. And we didn't ask the CFA whether we should do it. We felt that was really inappropriate.

In fact, our argument here today is not that we want to be in the CFA or the NCAA, we are arguing that we should be free to negotiate our best interests of our property rights with the CFA, with the NCAA, with ABC, with NBC, with CBS, with the National Council of Churches or whomever else, that that's a precious right of the University of Oklahoma.

[100] So independently of any other consultation, our Board of Regents wrestled with the risk involved in the NCAA threats and decided that we had no other course in terms of our responsibility to the taxpayers of this state who own our university then to seek relief in the Court today.

* * *

[102] Q. (By Mr. Ward) President Banowsky, what is the economic importance or significance of the football generated revenue to the University of Oklahoma's other athletic departments? A. Well, it's the bread and butter, it's the milk and the dessert. We engage in seventeen intercollegiate athletic sports, including men's and women's, football and then eight men sports and eight women sports.

The only one which is revenue producing with the possible exception of minor revenues in basketball when we win the Big 8 championship as we did a year or two ago, but we don't regularly win that championship, and one or two of the other sports that have very minor revenues, the only [103] revenue producing sport is football. Football not only doesn't require one dime of taxpayers' money, it pays the way for itself and for all of the rest of the sports programs of the University of Oklahoma, men's and women's.

For the first time this year, Athletic Director Wade Walker came to my office with the news that we were going to run into

the red in our sports program, that's because of inflation, that's because of all of the money we invested in women's sports because of Title 9.

We have, Your Honor, in 1975 put forty thousand dollars into women's sports, 1975. This year, nineteen hundred and ninety thousand dollars, that's almost a one million dollar increase in a five-year period, all of which came from football revenues. Football picks up the deficit in tennis, track, golf, wrestling, gymnastics and all of the others.

We built a new track or surfaced the track with football revenues. We built a new baseball stadium partially with football revenues. We're building a gymnastics facility with football revenues.

And Mr. Walker advised me almost a year ago that I'd better go to the board with a recommendation that we do what at least a third of the schools in our conference have already done, and that is eliminate some of the so-called minor sports.

[104] The University of Georgia has eliminated wrestling. The University of Colorado has eliminated a number of sports. Missouri has. We wrestled all summer with a special presidential commission to try to find some way to produce enough revenues to be able to keep alive these other sports.

What's at issue here is not the survival of football, we're going to play football. What's at issue is whether outside sources are going to negotiate our property rights and drain off enough University of Oklahoma revenues so that we eliminate all of these other sports in which young people participate.

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[107] Q. President Banowsky, I think everyone would concede that the University of Oklahoma has a truly rich athletic

tradition. Does this rich athletic tradition have meaning to its academic as well as its athletic programs? A. Yes. As you know, Your Honor, my predecessor, George Cross, was the first to make the statement that he wanted to build a university our football team could be proud of.

I have tried to pick up that philosophy because I feel that it's time for Oklahoma to have a nationally distinguished university academically.

The point I wish to make is this: We have no greater asset in our aspirations academically than our rich athletic tradition because excellence is contagious. I am sure you know how much it means to our university, not to the football program but to our university, when sixty million people watch us in a distinguished performance in the Orange Bowl. We are very delighted that we will be on national television next week at the Coliseum in Los Angeles, not so people can see our athletes play other athletes, but because we're fighting to create a greater University of Oklahoma nationally. We have no greater asset than the national attention created by our great athletic tradition. And nothing would more greatly damage, and I mean this if the Court hears no other point from the President of the [108] University of Oklahoma, this is the one point I would want you to hear.

We could suffer no greater damage in our desire to become a nationally distinguished university academically than for us to suffer an erosion of the excellence of our athletic tradition. It creates as President Davidson said, a sense of community, a sense of excitement. He mentioned the two universities that dropped football and then have reinstituted it because they saw what they lost as a university. I would hate to think of trying to build what we envision for the University of Oklahoma without what our athletic tradition means to us.

There is an association, Your Honor, called the Association of American Universities. It is comprised of the fifty finest

universities in the country, twenty-five private and twenty-five public. The public ones are the ones that we should compete with, Michigan, Berkeley, Minnesota, Wisconsin, Texas. Oklahoma, Your Honor, is the only state in the Big 8 which doesn't have at least one university in that distinguished association of the best universities, and the state of Iowa has two.

We want to beat everybody in football, I want us to be the best academically. We have been willing to have regional comparisons in academics and were satisfied only with national comparisons in football. It is our football [109] momentum, our athletic tradition which gives us a great asset in this national aspiration. And I can't begin to overstate the loss that we would sustain if we lose our strength in that area.

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[111] Q. President Banowsky, there has been a lot of discussion about what is happening here today among chief executive officers of other universities, has there not? A. Yes, sir.

Q. And you participated in some of those discussions with your peers and colleagues? A. Yes, sir.

Q. Have you discussed with persons in parallel capacities with yours these threats of sanctions and the fears that they share? [112] A. Yes, sir, I think it's had a chilling effect within our conference. Some years ago, Judge, every member of the Big 8 conference joined the other schools to make the 61 in the CFA. In Atlanta early last month we had two schools of our conference to say we no longer feel that we can stay with the program.

And I can tell you in the meetings that we've had in the intervening weeks—and Your Honor, to indicate to you how important this issue is, I had been at the University of Oklahoma three years before I was ever in the same room with all of the other seven members who are presidents or chancellors.

We not only have been in the same room, we got very well acquainted. This is an extremely important issue whose resolutions, I think, may have implications as a watershed on into the next century. Which is why it shouldn't be settled with a gun at our head or in some kind of a rush.

The Court ought to have the time to weigh all of the evidence and then reach the decisions, and while the Court is needing that time the University of Oklahoma ought to have the right of all of the options. We want preservation of all of our options, and we want protection from sanction. I would say protection from sanction and expulsion or threat of expulsion, those are the two things for which we're pleading.

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[115] THE COURT: Let me pose a question, and I am not inviting additional problems, you've got plenty as it is, but let's say this Court should agree with you and the very able witness that preceded you, and say, all right, the NCAA has no right to determine your property rights in these telecasts and go with you all the way.

They argue that we have the right given to us by you when you joined our organization you became subject to our bylaws and regulations, so you subordinate these property rights for the benefit of the whole organization.

All right. Say I agree with you entirely. I don't see that you're home free because then your very best batter or catcher or pitcher or quarterback or tackle may say, when I joined the university I didn't give you the right to telecast my batting or my pitching or my football playing, I want to negotiate with CBS or somebody else. Aren't you going to be faced with the same problem? And you [116] say, well, when you came and joined the University of Oklahoma you subordinated your right to the rights of the university.

THE WITNESS: Well, that's an intriguing question, it has never occurred to me. I'll say this, we may have — when I go into a television studio as I'm sure you have, Your Honor, frequently they'll stick a little thing in front of me, and it's a mimeographed thing —

THE COURT: I've never been in one, but that kind of makes sense.

THE WITNESS: And I say, "What is this?" And in effect I'm going to sign that mimeographed sheet that waives all my rights, privileges, duties and responsibilities, which means that if the show's a great hit and makes a million dollars I don't get any of it and so forth.

I don't know but what Coach Switzer and the others require our athletes now to sign such a simple but appropriate waiver. If they don't now, we will begin it immediately because I think that's only appropriate for us to require of students whom we recruit and give them for the most part a very free and challenging education and provide the base for their career. And so it seems to me that that's a reasonable thing for us to expect.

THE COURT: Well, that's the very argument that these people here make with respect to their comforts afforded [117] you.

THE WITNESS: I'll tell you this, they haven't given us that kind of a statement to sign, and if they do, I'll recommend that we not sign it.

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[126] Q. (By Mr. Andrews) Sir, you spoke of the conditions that led to the founding of the CFA approximately five years ago, and the fact that you felt at least that the CFA was founded among other reasons because of the NCAA's appropriation of television rights of its members.

My question is during all that period since the CFA was founded, why hasn't the University of Oklahoma brought this question to the floor of the NCAA convention and raised the question as to whether the NCAA for future years has the right to control the manner in which you exercise your television rights? A. Mr. Andrews, if I said or implied that I thought the CFA was organized because we felt that the NCAA was appropriating our television rights, then I wish to correct that because that is not my knowledge or understanding, and I made a mistake if I left that implication.

In fact, I wasn't at the University of Oklahoma when the CFA was organized. My understanding is that the concerns were more nearly those expressed by President Davidson along academic regulatory lines as well as a general concern for the whole question of some reorganization so that [127] the football programs would determine the football rules.

I wasn't there and so I don't know for sure, but my suspicion is quite to the contrary that the television question sort of emerged out of the several years of frustration over these other issues which I've described.

Q. And it's true, isn't it, that since the CFA was founded they have continued to experience some frustration in getting some of their legislative proposals adopted by the NCAA membership? A. I would say consistent and very aggravating frustration which today, of course, brings us into Federal Court.

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[132] **CHARLES NEINAS,**

the witness, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. Charles Neinas.

Q. Can you pull the microphone around in front of you. Where do you live, sir? A. I currently live in Overland Park, Kansas.

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Q. (By Mr. Muchmore) What is your business or profession, Mr. Neinas? A. Athletic administrator. I am executive director of the College Football Association.

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[240] Q. Is there any indication or do you have any knowledge of any provision which provides that the NCAA would fix the amount paid to a national appearance and a regional appearance by agreement with ABC as opposed to that amount being set by negotiation between ABC and the individual schools that appear in those games? A. I think I know how the system operates if you want me to explain that.

Q. Well, there isn't anything that would prevent say a Texas-Oklahoma appearance from receiving a good deal more than a less attractive appearance if they were to negotiate a higher fee with ABC, is there? A. I would assume that the plan would provide that, it would be interesting to see what the reaction might be on it.

Q. Well, it would be interesting to see what ABC's reaction might be, is that right? A. (Nods head.)

Q. But they are committed to only pay a minimum aggregate amount each year for the games they televise and they are free contractually to split it up as they see fit between the institutions that appear in those games? [241] A. Mr. Andrews, what happens is the minimum aggregate is divided so that in actuality there is a portion of money set aside for national games and a portion of money set aside for regional games. And then what happens is this is what ABC offers to the contracting institution.

Q. Right. But it's ABC that does the dividing rather than NCAA. A. It is ABC that does the dividing, sir, but the NCAA consents to it.

Q. Well, they don't have any right to object to it, do they, under the contract? A. I guess they run a litmus test to see how it comes out with the NCAA television.

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[330] **DAN GIBBENS,**

the witness, being first duly sworn to testify the truth, the whole truth and nothing but the truth, answered in reply to the questions propounded as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please? A. Dan Gibbens.

Q. Mr. Gibbens, where do you live? A. Norman, Oklahoma.

Q. What is your business or profession? A. I'm a Professor of Law at the University of Oklahoma.

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[332] Q. Over the years have you attended the NCAA conferences? A. The annual conventions, I have attended all of those beginning in 1977.

Q. All right. During those times have you seen efforts made at reorganization and that sort of thing between— A. Yes.

Q. — the CFA and other situated larger schools and the NCAA generally? A. Yes.

Q. And what sort of — Tell the Court about what efforts have been made and what the results have been? A. Generally

the idea has been to try to get within the NCAA a community of universities that have similarly designed programs. And as far as the University of Oklahoma is concerned and the schools in the Big 8 Conference our concern has been that as a group of schools that have highly competitive programs not only in football but in other sports that there are certain issues that yield one kind of a need with those highly competitive universities that are different from the great bulk of the NCAA membership. And I believe [333] there is something like 743 voting members in the NCAA, and the schools that have the highly competitive football programs are less than 100.

And so there are a number of rules which have been passed in the NCAA which are really designed to kind of accommodate the needs of those programs which are less competitive.

There's been a number of rules which have been adopted over time and prior to my work as the University's faculty rep, a number of rules which have been designed to establish a kind of, as we see it, a kind of a level of mediocrity and to make it more difficult to compete at the level of excellence that we would like to pursue.

And our felt needs in this regard to have rules which permit excellence seeking have been frustrated because we're in a small minority within the total NCAA body. The efforts to restructure the NCAA was designed to create within this membership of 700 plus a unit which could at least for competition purposes have its own rules that would be permissive of the kind of competition that we seek to achieve.

Too restrictive limits on scholarships, too restrictive limits on scholarship amounts, first scholarship numbers, scholarship amounts, too restrictive limits on the number of coaches that may be employed in a particular sport, too restrictive limits on recruiting practices, these kinds [334] of restrictions will frustrate the programs which are seeking national excellence, national high level competition.

And we know that our goals, our goals for excellence are not shared by the great majority of NCAA members, and they just really do not understand what it takes to run the kind of program that we and similar universities would like to run. So we wanted to create this unit within the NCAA to make rules that would fit our needs.

Q. So your objection to the original way were to those which were purely regulatory within though the framework of what the NCAA was designed to regulate? A. Yes.

Q. All right. Do you see that as being somewhat different than the areas in which they attempt to regulate or attempt to control television broadcasting? A. Quite different because the NCAA as I understand it was designed really for two things. And this is expressed in the Constitution. It was designed to provide rules of competition so that schools competing could compete on an equal basis, equal fair basis.

Whenever you have a game, whenever you have a competition you've got to have carefully drawn rules so that people are playing by the same rules. And so you do need recruiting rules, you do need scholarship number limits, scholarship amount limits, whether you need coach limits is [335] something else again. But you certainly need rules on the number of players and number of scholarships that can be granted so that everybody is competing on the same basis.

Now, the difficulty that the major schools have had with, the Division I type schools have had is that the rules which have been drawn for fair competition have been drawn for fair competition by the 700 and have not been drawn for fair competition by those who seek true excellence.

Now, let me, I think, come back to another part of your question. The NCAA has the purpose of reasonable regulations for fair competition, it also runs championships, those are the two, national championships in intercollegiate sports. The other area which the NCAA has gotten into over the years and

apparently by accident and not authorized by the Constitution. there's nothing in there that I see that authorizes it at all. is they become a highly business-oriented marketing agent for television primarily. And not only for the television rights for the NCAA championships which they do create and run, but the television rights for individual schools, regular season competition.

In my judgment this kind of commercial activity is really not authorized, I don't see it anywhere authorized in the Constitution. I know that it wasn't objected to over a period of years, I'm not sure why. But the commercial activity just doesn't fit within the NCAA role as a [336] regulator of intercollegiate sports, nor does it fit within the NCAA role of operating national championships. It is totally outside of that, and I think in some instances actually frustrates the regulation role.

We have been, the University of Oklahoma has been for the restructuring because we think that the rules do have a bias toward mediocrity that we don't appreciate. Be that as it may, we recognize that we need a national organization like the NCAA, and the NCAA has basically performed well the role of providing rules of the game. Basically we like the NCAA, we're loyal and devoted to the idea that rules for academic standards, rules for recruiting, rules for how the game is played are rules that we need.

We don't see any need for a single national organization to market our product. We don't see the need for the NCAA to tell us how to market our television rights, and we don't see any difference really between our television rights and the gate tickets that are sold, or the concession items that are sold, these are all aspects of our creation at the University of Oklahoma, incidents of our game which we ought to be able to market in the way that basically best suits us.

* * *

[343] Q. All right. With your experience in this contract and with the CFA you have several times, have you not, been present in meetings where the NCAA indicated that they were going to take sanctions against the CFA schools if they signed the contracts much in the same way that they would take sanctions if they violated the competitive rules? A. Yes, I was at two particular meetings where that was discussed. I think probably as much influential as anything else, and this was referred to by the NCAA people that came to the meetings, but as influential as what was said at the meetings was what appeared in the newspapers, and it was kind of a repeated theme, a strong theme that any [344] university who remained committed to the CFA-NBC contract would be subjected to severe NCAA sanctions. And not only with respect to their football team, I suppose it's nothing worse than that as far as the University of Oklahoma goes, keeping us out of the bowl game, and that was specifically discussed in one of the NCAA releases as a real possibility but also our other sports. We've got gymnastics, obviously, that is headed for another year of possible national championship, our wrestlers have that kind of quality, and our basketball coach feels he's always going to be in contention for national championships. The sanctions discussed—hit all of the sports.

Now, here's the thing that seems particularly unfair to me, and it is that what we are talking about is not a violation of some recruiting rule, not a violation of some rule that has to do with fair competition, not a violation of the rule that has to do with academic standards, we're talking about a violation of a rule that has to do only with commercial activities which the NCAA is assuming to conduct for us which is not authorized by the NCAA Constitution even.

But the thing that seems so unfair to me, and I would like to reiterate, because it just strikes at the heart of the real issue between us and the NCAA at this time, is that the kind of sanctions, the very severe sanctions that [345] have to do with

athletes participating in championship events, that would prohibit them from participating, are talked about being applied on account of what? Nothing to do whatsoever with the athletes themselves, nothing that has to do with fair competition, the source of the sanctions is just peculiarly resulting from the commerical activity of the NCAA, which is of an entirely questionable origin in the first place. The fact that it's commercial is the main point.

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[346] Q. Yes. All right. As best you can compare those, what does it mean in terms of revenue for the University of Oklahoma between the proposed CFA contract with NBC and the proposed NCAA contract with ABC and CBS? [347] A. Okay. The University of Oklahoma would hope to get the maximum committed out of both contracts. In other words, we hope to continue to have the kind of football teams that will attract the maximum TV coverage. Making that assumption and using some rather conservative projections of how teams would be selected over the four years of these contracts, the amount that would be available to us over the four years under the CFA-NBC contract would be in the range of 3.8 million.

The comparison, as best we can judge it from the information we have about the NCAA contract is in the range of 2.0 million to 2.5 million. In other words, we're talking about over—well over a million dollars over a four year period. Now, honestly, I have to say that those are conservative projections in terms of minimizing the differences. And I have to emphasize that they are based on very limited information as far as the NCAA contract goes.

Q. All right. Thank you. But anyway for their purposes it's decidedly better in your judgment as far as returns of revenue for the marketing of our athletic programs on television would be substantially better than the NCAA contract as far as

you can tell? A. Probably realistically we would get about twice as much under the CFA contract as we would under the NCAA [348] contract.

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Cross Examination by Mr. Andrews:

Q. May it please the Court, Professor Gibbens. You indicated that one of the prime concerns of the CFA and its exception was certain rules that govern the NCAA's conduct of sports, particularly football, which insured a level of mediocrity in competition; is that correct? [357] A. (Nods head.)

Q. And you pointed to the limitations on the numbers and amounts, dollar amounts of scholarships, the numbers of coaches and certain recruiting practices; is that correct? A. Yes.

Q. Were those limitations adopted primarily for economy measures, and were they further restricted in the mid 70's to your knowledge? A. These particular restrictions, I believe the ones that you're talking about, were adopted before I became a participant. But I understand from my colleagues who were active at that time that they were adopted for economy measures. And the problem with that is, who's economy? Apparently for the schools that have programs with lesser budgets and less competitive goals. Not for the schools like the University of Oklahoma. We were not at that point asking for economy measures because the way in which we produce money as with many entities is directly related to the kind of expenditures that we're willing to make, and the more that we're willing to improve the quality of our program, the more we'll generate in terms of income.

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Trial before the Honorable Juan G. Burciago, United States District Judge, June 7-15, 1982.

[4] **FRED C. DAVISON**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. Will you state your name, please, sir? A. Fred C. Davison.

Q. Mr. Davison, what is your business or profession? A. I'm president of the University of Georgia in Athens, Georgia.

Q. How long have you been president of the University of Georgia? A. The end of this month will complete my fifteen years.

Q. Briefly give the Court just a quick sketch, if you will, of your personal background and your travels to become president of Georgia.

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Q. Please tell the Court, if you will, a sketch of your background. A. I was born in Atlanta, Georgia, grew up just north of there, attended Marietta High School, Emory University for preveterinary work, graduated from the University of Georgia [5] in 1952, with a degree in veterinary medicine, returned to my hometown and practiced for six years, elected to limit the practice that I was in and feeling that that could not be done in my hometown, I took a break to gain some additional training that I wanted in clinical pathology. In order to do that, I took a position as a research associate at Iowa State University among several offers, with an Atomic Energy Commission project on the toxicity of stable rarities, a very exciting time in the evolution of that field.

A year later, I was named director of that project and simply became trapped in research and university work by my interest. I stayed with that project for five years, earned a PhD during a period in comparative pathology and biochemistry, brought the task force eight to its conclusion of its acute studies, was asked to move to Chicago as assistant director of scientific activities of America Veterinary Medical Association, was requested to move back to Athens one year later as dean of the College of Veterinary Medicine.

Two years following that, was asked to move to Atlanta as vice-chancellor of the university system of Georgia. After one year in that position, I was named the seventeenth president of the University of Georgia, in Athens, the job that I have held since 1967.

Q. In your capacity as president of the University of Georgia, did you become at least knowledgeable about the [6]athletic programs at the university? A. Yes, the University of Georgia is a member of the Southeastern Conference. In the Southeastern Conference only the presidents vote on policy, consequently, you have to become involved. Now, this was no strain on me, I had a personal interest and enjoyment in it, anyway. Also, under the rules of our conference, not only do the presidents carry the vote but our separate athletic associations are set up in such a way that the majority of their membership must be faculty.

In our case, the president automatically is the chairman of the athletic association, vice-president for business and finance is the treasurer of that, and the faculty chairman of the university becomes the secretary.

So there is no way at the University of Georgia to avoid very close daily contact, at least with the broader policy issues of what we are doing in intercollegiate athletics.

Q. All right, sir. Reference has been made to the fact that the actual plaintiff in this case is the University of Georgia Athletic Association. Just briefly outline to the Court, if you will, what the connection is and the relationship and duties and responsibilities of the athletic association. A. The University of Georgia spends no appropriative funds in any of its intercollegiate activities, those are the programs that—in which championships are offered by the Southeastern Conference.

[7] The athletic board was set up as an agency to function for the university, and if I'm not mistaken, actually that was established by an act of the legislature for both Georgia Tech and the University of Georgia. So that, in effect, while we don't have to, we do under that agreement send to the legislature and the leaders of each year, our audited books and everything else, but the University of Georgia Athletic Association does become the real agent for the university in all of these operations.

While we don't own the property, any capital improvement that is made on that property must be negotiated for and must be carried out through the activities of the board. All of the policies that we set internal are functions of the board.

So the athletic association is an operative arm of the University of Georgia, as far as its athletic program is concerned.

Q. Doctor Davison, tell the Court, if you will, why it was that the University of Georgia Athletic Association and you, also, became involved in this lawsuit. A. Judge, it's something that evolved that didn't happen as a single decision.

I don't know exactly, counsel, how far back you want me to go, but I can go back and trace it if that's all right.

I have had a continuing concern, and perhaps this is the root of my real interest, with N.C.A.A.'s activity, particularly [8] the arena of academic standards because I think that they have been detrimental to the high school athlete in our state by not offering a challenge to the athlete at the stage in their development, not using it as an incentive for academic performance.

When I came as president of the University of Georgia, for instance, there were two associations that still had some sort of objective floor for participation; Atlantic Coast Conference and the Southeastern Conference, to my memory.

The N.C.A.A. was moving toward what came to be known as their one point six rule, which incorporated the use of some objective standards, such as S.A.T. or A.C.T and performance, grade-point average. We knew that at the conference level and we went about putting together our one point six table, the N.C.A.A. table that came into being, and by the way, it was an excellent table, and it was at that time I had no concern at all, when it came into being, we request to give up our separate standards. We did give up those standards. One year later or two, I can't remember specifically, the N.C.A.A. standards were modified and weakened, in my opinion, by substituting rank in class for grade point average; the near year we were asked to give up all of those standards and go to a simple two point high school graduating average, which at a time when grade inflation was beginning, took all of the pressure off of the high schools; all you had to do was stay [9] in school, get a two-point average, took the pressure off the coaches and took the pressure off the high school faculty, and in many—in our part of the country, many of our perspective athletes simply don't have the encouragement at home to perform in high school. We lost that.

Now, this was a problem that I have been fighting ever since. In fact, it led to my first interest in the C.F.A.

Q. Right there, tell the Court what the C.F.A. is, please. A. The C.F.A. is a group of institutions that have common interest primarily in the sport of football that form together out of a sense of separate frustrations, at least this is my interpretation, its dependency and its membership comes from the conferences. Each of the conferences elects someone to a board of directors, the independents have elected representatives to that board, and the separate conference commissioners have an elected representative to that board.

Now, I think that probably along with any concerns about academic standards, which I felt could be addressed if the N.C.A.A. were not quite so monolithic, and if it could be reorganized to a point that those of us with common interest could look to our own standards and our own rules inside the N.C.A.A.

So initially, my approach to the academic standard problem was on that, looked at the organization of N.C.A.A., itself, [10] and the potential reorganization. This was a very frustrating time. I can't remember the dates, but gosh, it's been back in the mid Seventies, we offered programs for reorganization, they got voted down in the Atlantic Conference, we came very close to a reorganization, but an amendment that was put in by the Ivy League again spread us out so that we didn't have that cohesive group that could make their own decisions.

In my case, the one I was interested in was again strengthening the academic standards, but this continuing of organization came into it at that point, and the C.F.A. was the result of that kind of frustration in which these schools came together and said, "Can we—can we come together as a consensus group, with the coaches' group, athletic directors' group, faculty-chairman groups and commissioners' group that could meet, could discuss the problems we have in common, could become cohesive enough to offer those—and we are an affiliate number of N.C.A.A., offer those to convention in N.C.A.A. in an effort to maybe bring out our concerted effort to getting some of these issues past, and adopted into the rules of the larger organization?"

This—this C.F.A. was formed initially after an organizational meeting at which I was asked to attend as a member of the Southeastern Conference, elected by the other presidents in that conference. I was elected chairman of the board in that organizational meeting, and that is the position [11] I have held and I have been the only chairman of the C.F.A. until this past weekend, when normal rotation, I rotated off that board, and that board will elect its new chairman from its new board.

So I have followed the activities of that group with great interest.

First two or three years, virtually all of the discussion in the C.F.A. centered around academic standards, most of the options that we offered in the form of proposed legislation to N.C.A.A. addressed these.

We also looked at coaching, recruiting versions. We offered other legislation, but their primary thrust was academic both in discussions and what we offered.

Now, concurrently with a great deal of this activity, there were other things that were imposed on us. Title Nine. The University of Georgia was the first institution initially audited under Title Nine. We have very recently received full clearance in that audit, and I think we are the first major university to receive that, but there were—there were beginning to be imposed on us, for good reasons, brand new costs.

Now, at the university, I want to reiterate, that there are no appropriative funds. So whatever expansion takes place at the university must come out of the funds that we generate from the resources of our athletic program.

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[13] Now, I began to have some concerns at this point about television. First time I had. One was during that period the ratings were dropping. The professional ratings were going up in television. The college ratings were going down.

Two, all of a sudden I realized that, in essence, there was no real competition in the marketplace to say that another way the University of Georgia had no options as far as its television path was concerned. It didn't cross my mind at that time that that was anybody's fault but ours. Never [14] crossed my mind that I didn't have the right to seek other options. The television committee was instructed through a period of time,

and this is over a period of time, in which to continue to examine this in which I also sensed a building resistance on the part of the hierarchy of the N.C.A.A. Coming at one time were the reinterpretation of something that in their bylaws, I couldn't interpret that way; that indeed they did have sole right to my property, the university's property, as far as television is concerned.

I told them I didn't think they had that right.

Our television committee continued to look at this, and sometime in June of last year, we instructed them to see if that committee made up of voluntary people, all of whom had other jobs as football coaches or law professors or something else, and I was on that committee, to see if an alternative package could be negotiated that could be put before me as the person held responsible for the physical soundness of the University of Georgia's athletic program, that I could view against the negotiated package that N.C.A.A. was doing for me and give me the right to take the one that was in the best business interest of the University of Georgia.

Now, the business interest also includes many things besides dollars, as far as I'm concerned, in my responsibility—my responsibility to keep the stadium full, to keep people wanting to come back, so I had to look at it. Well, this [15] group went out and in a very short time brought back a package, not just a package, but a written contract with N.B.C., for me to view. Starting back in the spring, I tried to begin to find out what the specific counterproposal would be from N.C.A.A.

We had Mr. Hallock, who will be here, come to our meetings, and all we could get were the principles of negotiation. We couldn't see a contract. We met in Atlanta, the N.B.C. contract was in hand for me to look at. There was still no contracts that I could look at.

We had a second meeting in Atlanta, and this was only a couple of days before we had to opt in or out of the N.B.C. contract; Wilson came back and there was style.

Now, imposed on all of this was this mounting concern that not only said that they owned—that N.C.A.A. owned my property, the university's property, but that indeed if I continued the action I was taking, sanctions would be taken against the institution, and the implications were that those sanctions would not be just in the football program, but could be against all of the programs that we have.

Now, if you don't think that has a chilling effect, you have to realize that the University of Georgia has a broad gauge program that competes, well, nationally, and if I lost that right, I disenfranchise every one of those young scholar athletes that have come, their understanding that they would [16] have that right to compete nationally.

And the same effect was building in the other schools.

Q. You're talking here about other sports as well as football? A. I'm talking about all, basketball, tennis, everything. And that was the implication. In fact, it was stated, it was stated in our Atlanta meeting, that not only that was the fact, but that those sanctions would be expedited.

Q. Who stated that? A. Tom Hansen is our member.

Q. Who is Tom Hansen? A. He is an employee of the N.C.A.A. And it was also in the press at the time, you have heard that N.C.A.A. activities are covered in the press, so are C.F.A., but it was covered in the press that indeed these threats were real.

MR. HARRY: Your Honor, I object to the testimony and ask that it be stricken, of threats in the press, unless that is specifically identified and made precise.

THE COURT: Well, reference was made to the previous hearing before Judge Banks, and I think the Court's aware of it, I know of the nature of it, so the objection is overruled.

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[20] Q. What did you observe, if anything, among—without saying that they said or anything, what happened, what was the observed effect of these threats on the other institutions? A. That they simply couldn't take the chance of incurring the sanctions that the N.C.A.A. would impose on them.

Q. And, therefore, abandoned the N.B.C. contract? A. That's correct.

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Cross Examination by Mr. Harry:

Q. And you have now seen the contracts between the N.C.A.A. and the networks for 1982, haven't you? A. I haven't studied them.

Q. Have you seen them? A. I really can't say that I have.

Q. You don't recall having received copies from Mr. Neinas? A. I remember in our conversations that one was there, but it had been sent.

Q. So you have had the opportunity? A. Absolutely, yes.

Q. Now, is Georgia proceeding at the present time to make contracts for its football games on television this fall? [27] A. We are.

Q. Pursuant to the N.C.A.A. contracts? A. We are.

Q. And how many of those game contracts have been made, sir? A. One, to my knowledge—oh, excuse me. Inquiries have been made about one game. We have not seen the contract for that game yet.

Q. And what game is that, sir? A. That will be the Clemson game on Labor Day night.

Q. Now, are you knowlegeable about the arrangements for that game? A. In general.

Q. Could you tell the Court how that came about? A. To the best of my knowledge, it came from a telephone call to our athletic director asking of our interest in changing our game with Clemson two weeks earlier, placing it on Monday night of Labor Day.

Q. That would be September 6th, 1982, would it not? A. Yes, sir, I assume so.

Q. So, Doctor Davison, did that call come from the A.B.C. network? A. I don't know.

Q. And could I just recap for the Court, and say that I believe we understand that Georgia and Clemson were [28] scheduled to play at Athens in the daytime on Saturday, September 18th? A. I can't remember specifically, but that sounds right.

Q. And that's a big game because Georgia was the national champion two years ago and Clemson was the national champion last year? A. Yes, sir, it's always the big game.

Q. So, at the behest of the network, A.B.C., Georgia agreed to move that game from September 18th to the night of Labor Day, September 6th? A. That's correct.

* * *

Q. Now, has a price been agreed upon for that game? A. I have heard figures. I have not seen a contract. My understanding from that athletic director that what we were offered was a one point one million dollars to be divided, plus a fee of two hundred fifty thousand dollars [29] that was a relocation and costs above normal cost incentive.

Q. Now, is that one million one hundred thousand you referred to to be a payment from the network to the schools to be divided between them in what we call a rights fee, sir? A. I am not familiar with the terminology.

Q. Is it your understanding that the two teams divide a million one hundred thousand dollars equally? A. That's my understanding.

Q. And what is your understanding about the two hundred and fifty—did you mention two hundred and fifty thousand dollars figure for moving? A. Yes, I did.

Q. What is your understanding about how that is divided? A. It will be divided equally.

Q. And is that a part of—is that in the same category or different category from the million one hundred thousand dollars? A. In our—I assume it's different and it was a separate part of the the contract, or offer.

Q. Is it not true, Doctor Davison, that Georgia does not keep this money that it receives for televising—for the rights to televise football games? A. That's correct.

Q. Where does the money go? [30] A. It goes to the Southeastern Conference.

Q. What do they do with it? A. They divide it up on a formula and distribute it to the institutions.

Q. And how many members are there in this Southeastern Conference? A. Ten.

Q. Who are they? A. Both Mississippi, Mississippi State, Alabama, Auburn, Georgia, Florida, Tennessee, Vanderbilt.

Q. Louisiana? A. And Louisiana State, excuse me.

Q. And so that all those other nine institutions share in this television revenue? A. That's correct.

Q. And how do they share? A. I can't tell you precisely. I think that it's divided up into fourteen shares and I would have to check the books. I believe we get four thirteenths—excuse me— thirteen shares, the home team getting a larger portion. The Conference gets a share and the rest is divided equally.

Q. So essentially the team that plays from the Conference gets one or two extra shares for its being involved in the game is your understanding? A. That's correct.

[31] Q. Over and above what other members in the Conference get? A. That's correct.

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[33] Q. And is it not true that the College Football Association was formed for purposes other than the television matters? A. That's correct.

Q. And television came up later, after it was already in being? A. As an incidental.

Q. Now, what has the College Football Association done in regard to this lawsuit? A. Took an interest initially as we were trying to get an injunction. The board of directors and, in assembly, in accepting the budget, said that they would underwrite or would bear the cost of the expense until the next general meeting, [34] which was yesterday—which was this weekend.

Q. And, of course, that—has it, in fact, borne that expense? A. It was decided at the general meeting in Dallas, that indeed, it would, it would cover those debts incurred through yesterday, up to today.

Q. But not after today? A. That's correct.

* * *

[35] Q. Has Georgia ever availed itself of that kind of exception telecast, to your knowledge? A. Not to my knowledge, I don't believe.

Q. And is it not true, Doctor Davison, that the rules of the Southeastern Conference prevent any of its members from using the exception telecasts when they're playing a game with another Conference member? A. I am not certain, but I believe that there is a mileage restriction, but I am not certain about that. I know there [36] is a Conference rule concerning it.

* * *

[38] Q. Now, you're concerned about the legality of Georgia coming to participate in the N.C.A.A. television plan, are you not? A. Yes. I am also concerned about the N.C.A.A.

continuing that kind of activity in this progression of my concerns that started out with funding and going on to property rights. The more I looked at it, the more it became evident to me that indeed, I might be part of a monopoly, I might be part of a price-fixing scheme, and that's basically what I asked this Court to tell me when I was here in the fall, was to tell me what the limits of the law are, concerning my involvement in this kind of activity.

Q. That was—you're referring to the preliminary injunction before Judge Eubanks? [39] A. Correct.

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Q. So, you're still asking the court to resolve that basic concern? A. My major—I have always been more in the position of asking for declaratory judgment about what I could do.

Q. But you do not, at the same time, seek an injunction invalidating the N.C.A.A. contracts that are now in existence with the networks? A. I have a hard time separating the property rights issue from the initial questions.

[40] Q. So—A. So, I am—yes, I am interested in knowing what my legal position is as far as restraint of trade in the Sherman Act, so, indeed, I can make the proper decision after that as to what the university should do or another group should do.

Q. So, if the decision upholds the legality of the plan you would feel free in going ahead—and safe—going ahead under it? A. Yes.

Q. And if it holds the plan illegal, then you would exercise your judgment as to what you should do? A. That's correct.

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[58] Q. Now, you will recall, Doctor Davison, after this lawsuit was started, a temporary restraining order was entered into by Judge Eubanks, at the request of Georgia and Oklahoma? A. Yes.

Q. And the purpose of that was to protect you both from any coercion or threats, wasn't it? A. That's true.

Q. And wouldn't you agree, Doctor Davison, that N.C.A.A. at all times complied with that temporary restraining order? A. No. They have brought no sanctions against any of the in[illegible]utions, if that's what you mean.

Q. It's a little broader than that. After September 8, 1981, when this suit started, and the temporary restraining order was entered, are you aware of any coercive action by the N.C.A.A.? A. None, specifically, no.

Q. Certainly none in connection with Georgia. A. That's true, not concerning the television.

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[63] Q. Doctor, isn't it true that the N.B.C. contract with [64] C.F.A., gave its members a certain period of time in which to opt out or elect whether they would be bound by it? A. That's true.

Q. And did not that time, as it was extended, finally expire on December 14th, 1981? A. I can't remember the date. I remember there was a first date in early September and because of this activity, that was set forward and then it may have been set forwards, again.

Q. You wouldn't dispute that the ultimate decision on the N.B.C. contract was on December 14th? A. No, I wouldn't.

Q. And did Georgia tell N.B.C. that it would adhere to the contract? A. Georgia did not, it was an opt-out situation, and Georgia did not opt out.

Q. Did you then adhere to the N.B.C. option and maintain that you would go with that contract? A. We left our name in the position that if N.B.C. had a viable package, a viable

inventory, that, indeed, Georgia would be part of that. Again, depending on the outcome, I assume that would be tied up in whether those property rights were ours and everything else that's part of this court action.

Q. And what other members of C.F.A. took the same position as Georgia and indicated they would participate in the N.B.C. contract at the end? [65] A. I have no knowledge of that.

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(EXHIBIT YY-1)

DEPOSITION OF DR. FRED C. DAVISON
DEPOSED FEBRUARY 3, 1982.

Dr. Fred C. Davison, having been duly sworn, testified as follows:

[75] Q. Now, was NBC led to believe that the University of Georgia was part of the inventory being measured for its adequacy? A. We had never formally notified them that, but I assume that they would have assumed that we were because of our interest in the program—my particular interest in the program.

Q. Did NBC ever articulate the universities and colleges that it thought were available for its television contract? A. It did not—not to me.

Q. Well, how do we find out other than asking them, which we'll probably have to do, what football teams were available to their television program? A. I couldn't tell you.

Q. All right. How were the CFA members expected to let NBC know whether their games were available for its televising [76] or not? A. By notifying the CFA office as a clearing point of whether they wished to remain part of the inventory package or not.

Q. Okay. And did Georgia so notify the CFA office? A. No.

Q. So the CFA office didn't know whether Georgia's team was in or not unless it went on this Exhibit #1 letter, which indicated they weren't in? A. In a conversation on that the day before with Mr. Neinas, I told him that the University's position was that we were standing firm. I had absolutely no desire to be a martyr. If, however, the inventory dropped low, I thought it would do better for us to, indeed, as an organization just offer no package, but I don't know what was done beyond that point.

Q. In other words, Mr. Neinas was handling that, and you're not familiar with the details? A. That's correct.

Q. And you wouldn't have knowledge as to what other universities who are members of the CFA did in terms of advising Mr. Neinas on that subject? A. That's correct.

Q. Okay. All you know is that NBC, on the basis of whatever it was, deemed the inventory insufficient and announced the contract would not proceed? [77] A. That's correct.

Q. Okay. Doctor, do you know whether NBC was ever advised that there was any inventory? A. No, I can't answer that. I don't know.

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Q. So isn't it true, Dr. Davison, that from the time Judge Eubanks entered his order on September 8, 1981, until the time the crucial decisions were made by the CFA members, nothing coercive or threatening was done against CFA members by NCAA? A. I can't answer that. I can only answer for the University of Georgia.

Q. And you know, in fact, that nothing of that sort occurred in connection with the University of Georgia? A. That's correct.

Q. Okay. Let me show you, Dr. Davison, Mr. Neinas' letter of December 15 to NBC with a copy to you. Mr. Coats probably knows about it already, but that seems to relate to the subject. A. I read it.

[78] Q. Does that refresh your recollection that you received a copy of Neinas' letter to NBC, advising that CFA cannot provide a sufficient inventory of member universities for seasons beginning in '82 to allow the NBC contract to proceed? A. Yes.

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[105] Q. Was there a time when CFA considered changing its name to the College Sports Association? A. I can't really speak to you. You'll have to talk to people who were at the last meeting of the CFA. The only board meeting I've ever missed was the one at the last NCAA (sic) meeting because I did not attend the NCAA meeting. It may have been discussed there. There has been some general talk among many presidents that there needs to be another organization, but it's not come up in the CFA board meetings as an item.

Q. What has been your involvement in discussions about forming a new sports association that would take over some of the activities now conducted by NCAA? A. My position has been routinely and uniformly that our desire was to stay within NCAA. I have heard discussions of this type, though, as far back as four or five years ago as I [106] sensed a mounting — sensed a frustration on the part of other presidents with NCAA.

Q. So these have been outside of CFA activities? A. Outside of any specific agenda items in CFA.

Q. And have been, more or less, conversations among executives with common interests and problems? A. I will broaden my answer just a little bit. There have been several times just in discussion among CFA members but not toward any action that, indeed, it would be nice if basketball could be considered, because they're essentially the same schools as football, under an umbrella organization, but only in a way of general discussion, never by way of action or suggested action.

Q. Are you sure that Mr. Neinas drew up a structure for the national sports organization that would parallel the NCAA?

A. What's the date on that letter?

Q. It's November 19, 1981. I'll get it identified so you can see it. It's now marked as Exhibit #20, Doctor.

(. . . Defendant's Exhibit #20
marked for identification
by the Court Reporter. . .)

A. I assume this came through my office. I don't remember reading it, however. It was designed, as I see, as a discussion paper with the conference commissioners and others [107] meeting in late November, so I assume he drew this up. It bears his name.

Q. Yes, you don't recall seeing it before? A. I don't recall seeing it specifically.

Q. And were you aware that Mr. Neinas had drawn up such a structure? A. In our conversations — I thought it was after the first of the year. I remember him mentioning the fact that, indeed, several had asked and, in fact, in our conference meeting, more than one president had suggested that we — and, in fact, had it been a voting meeting of the Southeastern Conference, I imagine CFA would have been requested to draw up such a document, but it was not. It was general discussion again. I'll get this out and look at it, though; it may be a good idea. There's an awful lot of talk about it around right now.

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[148] Q. Dr. Davison, I'm going to show you Exhibit #26, a letter from Mr. Neinas to Dr. Singletary of Kentucky with a copy to you in which he urges Dr. Singletary to move or work for establishing a task force to develop an outline of a new organization which would be parallel to NCAA. I think it shows. It says he discussed the matter with you, and if you'd look at it, then I'll ask another question.

[149] (. . .Defendant's Exhibit #26
marked for identification
by the Court Reporter. . .)

Q. My question is this, Dr. Davison. Did you discuss with Mr. Neinas the matter of developing an outline of a new organization that would supplant NCAA in part? A. I'm sure that in general discussion terms this has come up in our private discussions.

Q. Was it between you and Mr. Neinas? A. Yes.

Q. And did you encourage Mr. Neinas in that discussion to enlist the CFA Commissioners' Committee to develop an outline of a new organization? A. I don't remember specifically doing that. I think it would probably have been more likely that, indeed, in our discussion which — and by the way, President Singletary had made the statement many times that we better get about setting up a parallel — that this would probably be a good item for discussion at the commissioners meeting, but I did not set that agenda.

Q. Did you encourage Neinas to proceed to get the CFA Commissioners Committee to develop an outline of a new organization? A. I don't know whether you would call it encourage or not. I don't remember the specific conversation that we had. [150] I certainly did not tell him, "Don't bring up anything like that."

Q. Do you deny that you encouraged him to do that? A. No, I certainly don't. I'm just saying I have no specific memory.

Q. You don't disagree with the statement here, you just don't remember clearly? A. I have no problem with this statement, actually.

Q. In other words, you would be happy if he would enlist the commissioners committee to develop an outline of a new organization? A. I think in a case as ours is developing, you'd be wise to look at any option you have even though I have maintained all along that our position — that my intention is to keep us within the NCAA, but you're foolish not to have an option.

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[76] **CHARLES M. NEINAS**

was called as a witness by the plaintiffs, and have been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. State your name, please? A. Charles M. Neinas.

Q. Where do you live, Mr. Neinas? A. Boulder, Colorado.

Q. All right, sir. What is your present occupation? A. Executive director of the College Football Association.

Q. How long have you held that position? A. Two years and two months, approximately.

Q. Tell the Court, briefly, your background and professional experience. A. After graduation from the University of Wisconsin, I was involved in radio and television work, subsequenctly joined the staff of the National Collegiate Association in 1961, and joined the Big Eight Conference as commissioner in 1971, and remained in that position until April of 1980, when I became employed by the College Football Association.

Q. All right, sir. Were you the first of the employees of the College Football Association? [77] A. Yes, sir.

Q. And what does that staff consist of now? A. The permanent staff consists of my assistants and myself.

Q. Now, what are your duties inside the C.F.A.? A. To administer the program developed by the board of directors and conduct the daily business of the organization.

Q. Have you become, over the years, familiar with the methods and structure by which the N.C.A.A. governs the televising of college football games? A. Yes.

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[80] Q. (Mr. Coats, continuing.) Now, with reference to Plaintiffs' Exhibit Two, can you describe to the Court, please, the background and the timing under which that interpretation [81] came out? A. The College Football Association was investigating matters pertaining to football television, and there was to be a vote on what the N.C.A.A. calls the "Principles of Negotiation," which authorized the N.C.A.A. to proceed to negotiate a new television contract—or contracts. The interpretation served to indicate that the N.C.A.A., through history and tradition, had control of football television, and—although this had been challenged on the basis of the fact that there had been nothing in the constitution and bylaws of the N.C.A.A. that specified that control existed.

So the council adopted an interpretation, it is my understanding, it was done the day prior to the mailing of the "Principles of Negotiation" to the N.C.A.A. membership.

Q. To your knowledge, is this the first document by which the N.C.A.A. formally asserted control over all of the televising of football games? A. Yes, sir.

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[104] Q. Mr. Neinas, do you know of any instance of N.C.A.A. television football in which any college or university was paid any price, other than the regional price set for that year, or the national price set for that year? A. I know of no difference in the price set of any game.

Q. And that means also the price actually paid for that game? A. That's correct.

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[106] THE COURT: Now, as I understand, the committee would meet, and the committee would—what would they do, recommend a rights fee to the network, which they accepted or rejected and negotiated a new one?

THE WITNESS: Basically, the committee would recommend what the rights fees would be for the regional and national and transmit that to the network.

THE COURT: But it still had to be acceptable to the network, I would presume?

THE WITNESS: Yes. I don't recall the network ever changing the recommendation.

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[107] Q. Do you know of any year in which the network paid more—no more than the compensation? A. No, the network would adhere to the—what was to be the total dollar and never exceeded the minimum aggregate.

Q. So over the years, the N.C.A.A. pact under the N.C.A.A. contract, the network would be paid the minimum wage paid for the total paid for N.C.A.A. tel— A. That became the minimum, maximum and actual fee, was all one and the same.

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[113] Q. (Mr. Coats, continuing.) Mr. Neinas, you were involved, I take it, in a contract between the C.F.A. and N.B.C, in regard to what would have been the 1981 season? A. That's correct, sir.

Q. Yes, sir? A. No, '82.

Q. The 1982 season, excuse me. There's been a good deal of testimony about that this morning, and I don't want to spend a lot of time on it, but if you would tell the Court, please, briefly, how that contract came into being and what became of it? A. Yes. The C.F.A. had been investigating television football form, and I appointed a committee in June, and the committee made recommendations to the board and at the 1981 C.F.A. meeting, which was early in June, in Dallas, the C.F.A. membership went on record and adopted a resolution to the effect that it did not agree with the interpretation offered by

the N.C.A.A. council under the date of April 17th, indicating that the N.C.A.A. had historical right to control the television rights of all its members.

Secondly, that the C.F.A membership was not accepting the N.C.A.A. football television plan as had been proposed, and the plan had been outlined to the C.F.A. membership, both [114] in terms of writing, as well as presentation by the chairman of the television committee, Mr. Hallock, at the C.F.A's annual meeting.

And the third was that the board of directors of the College Football Association was directed to move with dispatch to determine the salability of possible C.F.A. television plan. A committee was subsequently appointed. The committee proceeded to investigate. Eventually, in July, a meeting of the C.F.A board of directors received appearance by representatives of two of the major television networks. What resulted was a period of negotiation between the National Broadcasting Company and the C.F.A. The outgrowth of which was the development of a four-year contract worth one hundred eighty million dollars over the four-year period, which would have allowed C.F.A. members to have an opportunity to appear on network football—or network television.

Q. Every C.F.A. member? A. Well, the contract was developed in such a manner that every C.F.A. member who chose to participate in the contract, it was not mandatory that they participate in the contract, they could remain members in good standing in the C.F.A. and not participate in the contract, in participating in the contract if they so decided, but the C.F.A. contract would provide a guaranteed one million dollars over the four-year term to each C.F.A. member that elected to participate [115] and also would guarantee that each of the C.F.A members would have a minimum two appearances during this four-year period.

What happened was the C.F.A. membership on August 21st, 1981, voted to ratify the contract that was adopted or was—excuse me, was presented. They did so even though there were threats that institutions involved—getting involved in the C.F.A. football television agreement would be subject to the N.C.A.A.'s enforcement procedure, indicating that such institutions could be subject to penalty, whereby their entire athletic program could be placed on probation and, therefore, none of their athletic teams would be allowed to compete in the national championship competition. Also, it was mentioned that there was the possibility of expulsion.

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[116] Subsequently, some of the C.F.A. member conferences suggested the possibility of a special convention to address the topic of restructuring the N.C.A.A., which had been very important to our members for sometime. The result was a special convention was held and there was some restructuring accomplished at that point in time.

At that time, the N.B.C. network indicated a cutoff date upon which time they must know whether or not there was going to be a sufficient inventory for college football in 1982. Member institutions of the C.F.A. at that time were required to indicate whether or not they would participate, but the N.C.A.A. threat of probation and possible expulsion continued. The end result was there was not a sufficient number of C.F.A. members willing to take the risk of an N.C.A.A. probation [117] that would damage their entire program, so the contract was never implemented.

Q. What relationship did you observe between the N.C.A.A. threats and the number of teams which opted out?
A. In my opinion, it was very substantial, and that was the main cause that the C.F.A. contract was not implemented.

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[118] Q. If you would just generally characterize what the memorandum does and what import it had? A. The memorandum is from Walter Byers and refers to discussions relative to an N.C.A.A. football television plan, and those who would desire to televise on another program. It goes on to state, in essence, "Reports of such a commitment, this would be a commitment to a C.F.A. television package, "will be handled through the regular enforcement procedures of the association, i.e., an official inquiry will be sent to the chief executive officer of such an institution. The inquiry will be expedited since a deliberate institutional decision to violate the conditions and obligations of memberships traditionally considered the most serious kind of violation."

So this was the indication that the enforcement procedure against C.F.A. institutions interested in the C.F.A. agreement would result in expedited enforcement action.

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[125] Q. Do you consider that the N.C.A.A. is a voluntary organization? A. Voluntary, not at the major level. If you are a major athletic—major athletic program, the voluntary aspect of the N.C.A.A. is not there. You must—

Q. By "major"—would you tell us what you mean by "major"? A. The members of the College Football Association, I would classify "major" as Big Ten and Pac Ten and as well as some other universities, having a visible and active athletic program, and you will find, I think, that the C.F.A. membership engages in many sports other than just football with some success.

Q. And it is in all of these areas, is it, that they desire to stay with inside N.C.A.A.? A. Yes, the N.C.A.A. sponsors national championship competition in a number of sports now for women as well as men, and it is good quality competition, and if you want to compete for the national championship, you have to be an N.C.A.A. member to do so.

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[127] Q. All right, sir. Referring now to regular season college athletics, what other areas of media, television, radio, broadcasts, cable, anything else for the—of college sports does N.C.A.A. control? A. The N.C.A.A. controls the media rights to the national championships that the organization, itself, sponsors, but in regular season competition, that rests with the various universities and colleges. The N.C.A.A. does not control football radio, they do not control regular seasons basketball television, they would not control, for example, the television of the wrestling between Oklahoma and Oklahoma State, which is annually shown in this area. Obviously, there are conferences which sponsor championships. Some of those championships are televised either on cable or over the air, as well as various conference championships, so the N.C.A.A.'s sole control in the area of media is football television during the regular season, both over the air and now cable.

* * *

[130] Q. (Mr. Coats, continuing.) Looking at document forty-two, tell the Court, please, how that impacts upon the previous exhibits number seven and forty-one, or how it implements them. A. What it does, it is establishing the ground rules for two ground work schedulings for 1982, '83, '84 and '85 television football series. Your Honor, this is the first time that the N.C.A.A. has made arrangements to show college football on two networks, and what was done was to work out an arrangement whereby they could determine how there could be coordination in the scheduling between A.B.C. and C.B.S. Also, in connection, for example, with the scheduling of games so that the telecast of the two networks—two networks with possibly two exceptions, would not conflict. In other words, the game on A.B.C., if they had what was called the early game would be completed before the C.B.S., on that date, would have—the late game would appear.

And also, there was—recognizing that all college [131] football games may not be of the same caliber, they established

a system whereby networks could determine special dates, and on those dates, feature certain games which could be arranged for in advance, and each network would be given the opportunity for three such special dates.

This was done to—as I say, to work out an arrangement whereby the networks could have—well, as one network official said, "They would draft the dates for selection, plus they have an arrangement whereby they alternate on the special dates."

Q. All right. So that there was some kind of a coin flip involved in this document? A. It was advertised as a coin flip on terms of determining the special dates and who would go first on the first selection of games on other dates during the regular season. Now, if it was an actual coin flip or not, I'm not certain, but there was some process as the network official reported, so that they would draft the dates.

* * *

[132] Q. Mr. Neinas, how does this document affect competition between the networks for individual games? A. Well, virtually eliminates competition because it sets up a pecking order, so there would not be competition between the networks in the selection of games. One network would have first selection on one date, and the other network would have the first selection on the other date.

Q. And on the regular season, Saturdays, is it the import of that document that one television network has control on that date? A. They have control in terms of being able to determine the game they want and also the time slot to televise the game.

Q. And then on that day, then, the other network—how would it work for the other network? A. It would have the remaining time slots, and then would have its selection of the remaining number of games.

Q. And then vice versa, on through the season? A. That's correct.

Q. Would the—does the document contemplate a situation in which the networks would be bidding games against each other for any particular game on a regular season, Saturday for example? A. No, it does not, Mr. Coats, and as a matter of fact [133] at the College Football Association meetings on Friday afternoon when representatives of A.B.C. and C.B.S. appeared—

MR. HARRY: Your Honor, I object, he is talking about a meeting that occurred, and I don't know who was there.

THE COURT: Sustained, unless you can develop that.

MR. COATS: Yes, I understand.

Q. Back to the original question, Mr. Neinas, on the face of the document, itself, is there an opportunity for the networks to come in and bid for games on these different Saturdays? A. No, sir.

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[134] *Cross Examination by Mr. Harry:*

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[138] Q. Now, what is your relationship to the parties in this case? Why are you testifying? A. I am executive director of the College Football Association. Both the Universities of Georgia and Oklahoma are members of C.F.A.

Q. So are you in a sense their association, appearing on their behalf? [139] A. Yes, sir.

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[143] Q. Now, you testified to Mr. Coats' questioning that the minimum aggregate rights fees in these television contracts between the N.C.A.A. and the network were recommended by the N.C.A.A. TV Committee. Was that always true? A. To

the best of my recollection, there was a recommendation from the TV committee to the network. There may have been instances where the network may have recommended it back to the TV committee, but my recall would be that primarily, the recommendation went from the TV committee to the network.

Q. And I think you also testified, and I want to be [144] sure this is in the record for the Court, that A.B.C. determined the rights fees; would you say that? A. Yes.

* * *

[164] Q. And these threats had no effect on Georgia, did they? A. I think Doctor Davison could respond to that much better than I.

Q. I think he already has, Mr. Neinas, and he testified earlier that his institution, Georgia, adhered to the N.B.C. contract. You agree with that, don't you? A. Well, they adhered to it up to the point in time where N.B.C. indicated there wasn't a sufficient inventory to implement the contract.

* * *

[165] Q. Did these threats and coercion have any effect on Oklahoma? A. No.

Q. Now, what did happen, Mr. Neinas? You have testified that the N.B.C. contract failed on, I believe, December 14th, is that right, 1981? A. It was a December date, Mr. Harry. If you have it recorded in front of you, I will accept your word.

Q. Let's say on the fourteenth. I am not certain, but I think that's about right.

What happened then? How did that actually work its way out? Were you involved? A. Yes, sir.

Q. So you were running the C.F.A. office, which was taking the word of the various C.F.A. universities, as whether their decisions would be to adhere to the N.B.C. contract or not? A. That's correct.

Q. Now, would you just tell us, then, what happened? [166] A. The date was established, and I will accept your December 14th date, at which time institutions were to indicate whether or not they wished to participate in the agreement. And when the indications were that there was not going to be sufficient inventory—in the interim, I was in communication with N.B.C., and when it appeared that there was not going to be a sufficient inventory to make the contract feasible, N.B.C. so advised, and we in turn jointly issued a press release to that effect. And then we notified the C.F.A. membership.

Q. Mr. Neinas, I meant to cover in a little more detail of what the universities told you, who told you what, about their—whether they would stay with the contract or— A. Well, the communication between our office and the universities—

Q. Yes. A. —was with different individuals at different universities.

Q. But tell us what some of them told you? A. Well, some of them indicated that they were not going to participate in the N.C.A.A., and they were so notifying us on the specified date.

Q. And I assume now you wouldn't know how many? A. How many told us "no," or how many told us "yes"?

Q. How many told you "no." [167] A. I don't think I could, at this point.

Q. Fine. I wouldn't expect you to. That's a long time ago.

And others told you that they had reached the decision that they would adhere to the N.B.C. contract? A. Yes, sir.

Q. And do you recall how many of them there were? A. No, sir. There were some conditional nonacceptances Mr. Harry.

Q. I see. And who made the judgment that the balance of the affirmative ones was insufficient to make a viable inventory for the N.B.C. contract? A. Arthur Watson, the president of N.B.C. sports.

* * *

[169] Q. I understand. Mr. Neinas, on the threats and coercion, there was a temporary restraining order entered in this case on September 8th, 1981, when it was filed, and I am sure you are familiar with all of that? A. Yes, sir.

Q. And I want to be very clear on one thing for the Court: was there any threat or coercion by the N.C.A.A. against C.F.A. members after the temporary restraining order was entered? A. Against any N.C.A.A.—

Q. Against any C.F.A. member? [170] A. I can't cite one, sir.

* * *

[177] Q. So that it is your testimony that it is not possible with any group of colleges and universities to really establish an organization separate from the N.C.A.A.? A. No, I would not wish to indicate that. It's possible. But I think that you also have to look at the practicalities involved.

Q. Now, did you, yourself, at some point in time, draw up a plan for a sports association that would perform the functions of the N.C.A.A.? A. I was requested to develop a draft of something that became—I forget what its title is. But it was a sports association.

Q. It was called the "University Sports Association"? A. That's it, U.S.A.; had a patriotic ring.

Q. And what was the occasion for your drawing up that plan? A. My recollection was that Chairman Davison, Chairman of the Board Fred Davison, and a conference commissioner, asked if it would be feasible to even draft an organizational structure.

[178] Q. And did Chairman Davison indicate anything more than that he wanted to know if it would be feasible to draw it up? A. He had no more than, I would say, the normal curiosity.

Q. And did you then draw up this three-page outline of a structure for a national sports organization with the chart attached? A. Is it an exhibit, sir?

Q. Yes. Let me show you. Court's copy is GP. I will tender it in a moment, and your copy, Mr. Neinas, is here. And it's identified as GP. Would you state, sir, what that is? A. Structure for national sports organization.

Q. And is that the one you drew up? A. Yes, sir.

Q. Pursuant to Doctor Davison's request? A. Yes, sir.

Q. And let's look at the first page, which is the cover letter. Did you send this document to the entire board of directors of C.F.A? A. I must have. That's what it says, so I am sure I did.

Q. Then it says at the end, "Carbon copies to selected individuals," does it not? [179] A. Yes, sir.

Q. And who were they? A. I would assume—my recollection would be some conference commissioners and others, but who the others would be, I could not completely identify at this moment.

* * *

[182] Q. And to put it in perspective for the Court, is that the convention that followed the September meetings and discussions about restructuring, and it was a widely talked about matter in the N.C.A.A. and C.F.A.? A. Yes. There were two basic points of discussion. One was television rights, and the other was restructure.

Q. Could you explain to the Court—excuse me, I didn't mean to interrupt, but I think it is important to tell him what "restructuring" is. A. As I indicated earlier, Judge, there's nine hundred six members, at least, give or take a few. And for

purposes of legislation and competition, there are divisions; there is division one, division two, and division three. Division one is made up primarily of what you call "major athletic programs" of colleges and universities. Division two would be the intermediate division. Three would be primarily some of the smaller, liberal arts colleges.

Within the N.C.A.A. constitution—well, I should say within the N.C.A.A. bylaws, there are some bylaws which can be voted upon by each division. In addition, the N.C.A.A. sponsors championship competition in all three divisions.

And the group which I represent, the College Football Association, was actually formed—one of the major reasons for its formation was to get a restructuring, so that those [183] who are the major football program at least would have a majority vote on what was going to affect their programs.

There had been attempts to restructure in 1976, '77, and '78, and no meaningful restructuring had been accomplished. And, hence, they did call a special convention in the summer of 1981, again for the purpose of restructuring.

So what did happen was that different criteria was developed as it relates to what we know as "division one A" and "one double A." And I will try to clarify that for you.

Because division one can encompass universities that do not play football, but they could be very good in basketball, like Georgetown, then you have, only for football, division one A and division one double A. The one A institutions are those that you would consider more prominent in the sport of football; one double A would be institutions that would be slightly below those that are in one A.

And what happened as a result of the restructuring convention in December, was to reduce the size of one A from one hundred thirty-seven, I think it is, down to approximately ninety-seven.

Q. Now, just to put that in perspective, as the discussions were going on and C.F.A. was considering its situation, there were some approximately a hundred and thirty-five members in division one A, which was the football classification? [184] A. Correct.

Q. And they desired a restructuring that would reduce that number to—in division one A, so it would be fewer members? A. They wanted a more stringent criteria to bring together those that have a more similar-type program.

Q. I understand. Now, was that restructuring accomplished at the special convention in Saint Louis, early in December, 1981? A. There was a restructuring proposal adopted by—

Q. And what was the effect on the membership of division one A? A. It was reduced to approximately ninety-seven.

Q. And did that reduction occur by increasing the requirements for becoming a member of one A? A. Basically what it did, it removed a loophole.

Q. Which was? A. Which allowed some to be in one A.

Q. And the loophole was—would you tell the Court? A. There is a football-related criteria based upon stadium size, average attendance, what is termed "strength of schedule." In other words, the quality of teams that you normally play. And that had been placed into the N.C.A.A. bylaws, I think in 1978.

But, at the same time, there was an amendment adopted to [185] the effect that if you sponsored twelve intercollegiate sports, you could still be one A in football, even though you may not meet the football-related criteria—if I make myself clear.

And the basic thrust of what happened in December was to remove that particular amendment, so that then you would have to meet the test of the football-related criteria to see where you stood in a football-legislated division.

* * *

[222] Q. And was it in the thinking of the C.F.A. and its T.V. committee that its television plan and activities could be used as leverage to influence the N.C.A.A. on various matters? A. There is no question but what the feeling was that there needed to be some changes within the N.C.A.A. and that the opportunity to become involved in television might get the N.C.A.A.'s attention to consider some changes.

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[230] *Redirect Examination by Mr. Coats:*

Q. Mr. Neinas, you have testified about two provisions in the contracts between N.C.A.A. and the carrying network establishing a minimum aggregate fee. I want to ask you in the history of N.C.A.A. has there ever been any deviation [231] from, or a payment in excess, by the network in excess of that minimum aggregate fee? A. No, sir.

Q. So no matter what it is called there was also the maximum and actual amount paid? A. Yes, sir.

* * *

[233] Q. All right, sir. Now, in the context of the actual situation where a network would notify a host institution that their game with such and such an institution would be on television or was selected to be televised, did the host institution or even the visiting institution have any alternative as to another television source? A. No, sir, they did not.

Q. So they are dealing with the network — they could deal with that network or not be on television at all, correct? A. That is correct.

* * *

[240] Q. Laying aside those limitations on appearances and laying aside the compensation, is there any other necessity for N.C.A.A. to be the bargaining agent for all the television football schools in the country? A. I would think that the example cited on basketball would indicate that there does not have to be one exclusive bargaining agent. I go back to the point that the C.F.A.'s involvement in television to create some type of competitive atmosphere certainly spurred the N.C.A.A. on to change some [241] of its principles to make the plan not only more attractive to the networks but I would have to say that it probably makes the possibility that it might be more attractive to the viewers, as well. I don't believe that would have occurred if the N.C.A.A. had not become involved in television.

Q. We talked a little bit about basketball and basketball, as we have indicated, the teams sometimes form together a conference to sell their television rights — sometimes they do it individually, sometimes they do it in other groups, would that be a fair assumption? A. Yes, sir.

Q. Is that — excuse me. Is that, in fact, the way it works? A. It does work that way.

Q. And what about the effect on the years on the basketball project, and what would be the same effect on football if, indeed, this bargaining agency and the controls that the N.C.A.A. asserts were set aside? A. Well, college basketball is definitely increased in its popularity, not only is attendance increased but the amount of college basketball on television has increased and also the revenue generated by college basketball on television has increased substantially.

I gave two examples of the Big Eight and the Atlantic Coast Conference. Now the Big Eight went to a [242] midweek game. In other words, the Big Eight game was televised on Wednesday and in 1977 the average attendance at Big Eight games was seventy-five hundred per game. In 1981 the average attendance was eighty-six hundred a game. So the attendance actually increased. The revenue for basketball television increased and the amount of exposures increased.

One cannot get a ticket to Atlantic Coast Conference basketball games. They are sold out, and yet that conference has increased not only the number of games it televises, but the revenue to the Atlantic Coast Conference members has increased remarkably over the last ten years.

There is no question but what the popularity of college basketball has been enhanced by the exposure. And, interestingly enough, I think that one of the beneficiaries has been the N.C.A.A. basketball tournament, which is also increased substantially in its prestige and exposure.

When I was with the N.C.A.A. in the early sixties, we did not have a national network. The television rights to the N.C.A.A. basketball tournament were sold more or less on an individual station basis, and then a gentleman purchased the rights, an independent. Subsequently, the games were placed on N.B.C. Eventually the games started to get prime time exposure, and this last basketball tournament, televised by C.B.S. under a three-year agreement for forty-eight million dollars for the N.C.A.A. basketball tournament, [243] which is obviously enhanced by the exposure and prestige of now having its championship game televised in prime time.

Q. All right. So, if the court were to set aside this bargaining and the exclusive arrangement that N.C.A.A. has you do not forsee for college football the destruction of the system? A. You can still impose some regulations, but you do not have to have one sole bargaining agent.

Again, I go back to the point I think the C.F.A.'s involvement in college football television tends to show the competition is beneficial.

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[266] **CHARLES NEINAS**

was recalled as a witness, and having been previously duly sworn, testified further upon his oath as follows, to-wit:

Redirect Examination by Mr. Coats:

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Q. Please tell the Court where and how you learned that and what they are. A. The minimum aggregate fee, as expressed in the contract, remains the networks have developed what they [267] call the incentive fee to encourage universities to move either the date of the game or the venue of the game, and the indication in A.B.C. is that they will pay two hundred fifty thousand dollars for that move and as a result there has

been a reduction, or will be a reduction, in the regional game rights fees, but that the minimum aggregate, as listed in the contract, remain unchanged.

The two hundred fifty thousand dollars does not come on top of the minimum aggregate fee.

* * *

JAMES C. KOCH

[270] was called as a witness by the Plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

[271] Q. Would you state for the Court your name and address, please? A. James C. Koch, spelled K-o-c-h.

Q. Where do you live, Doctor Koch? A. I live at 3201 West Petty Road in Muncie, Indiana.

Q. What is your current position, Doctor Koch? I am professor of economics and vice president for academic affairs at Ball State University at Muncie.

Q. And that is in Indiana? A. Yes.

Q. Would you tell the Court just a little bit about Ball State University and about your responsibilities there? A. Ball State University is a publicly assisted institution. The enrollment this past fall was eighteen thousand five hundred students. It offers academic programs ranging from associate two-year degree programs through about twenty doctoral programs as provost and vice president for academic affairs. I am the chief academic officer of the institution and thus am responsible for the academic programs there.

Q. What are your academic degrees, Doctor Koch, and where did you receive them and when? A. I received a Bachelor of Arts degree in economics in 1964 from Illinois State University and received my Ph.D. degree in economics in 1968 from Northwestern University.

[272] Q. And what other — briefly, what other positions have you had with what other schools? A. From 1967 through 1976 I was in the Department of Economics at Illinois State University and progressed from assistant to full professor.

From 1972 to 1978 I was chairman of the Department of Economics there. During that time period I also visited at terms at California State University at Los Angeles, at Brown University at Providence, Rhode Island, and University of Grenoble, France.

Q. And within the area of economics generally, do you have — do you personally have specific academic specialties? A. Yes. I would consider myself to have three major specialties. The first is industrial organization in pricing, and that is a specialty that deals with the behavior of business firms with the market structures in which firms operate and compete and how they set prices.

Another specialty is labor economics and human capital and relates to how labor markets operate, how wages are determined, the costs and benefits of education and the like.

The third specialty is applied econometrics and deals with the application of statistics and mathematics to economic problems and uses those kinds of tools to help explain and [273] predict phenomena.

Q. And you have been published, Doctor Koch? A. Yes, I have.

Q. Without getting into all of it, have you had books published? A. Yes.

Q. And what have those been? A. I have published four books. One is entitled *Industrial Organization In Prices.* It's now in the second edition. Prentice-Hall is the publisher.

Q. Is that used in schools or universities? A. Yes. In fact, it's used at—from time to time at the University of Oklahoma.

Another book is entitled *Micro-Economic Theory and Applications*, published by Little-Brown, 1976.

Another is entitled *The Economics of Affirmative Action*, published by D. C. Heath-Lexington in 1976.

Another is entitled *An Introduction to Mathematical Economics*, which was published by Houghton Mifflin in 1980.

Q. And about how many articles would you say you had published in various journals relating to economics? A. Approximately forty or fifty.

Q. Have you, in the time that you have been working in the area of economics, been giving any particular degree of effort or interest to the area of intercollegiate athletics? [274] A. Yes, I have. I have had a considerable interest there.

First of all, I would say I am a fan. But, second of all, as an economist I have done a good deal of research into the economics of athletics and specifically the economics of intercollegiate athletics, and I have done a good deal of reading in the area, and in general would regard that as one of the areas where I have some interest and competence.

Q. Have you been published specifically in the area of intercollegiate—or I should say, the economics of intercollegiate athletics? A. Yes.

Q. Would you tell the Court what those publications have been? A. Yes. In 1971 I published an article entitled *The Economics of Big Time Intercollegiate Athletics* in the *Social Science Quarterly*.

In 1973 I published an article entitled *A Troubled Cartel —The N.C.A.A., in Law and Contemporary Problems*.

In 1974 I contributed an article to a monograph that came as a result of a conference that was sponsored by the National Football League Players Association.

My contribution to that related to oligopaly theory in sports.

Finally, in 1978, a College Socialized, and I wrote [275] it on a *Socio-Economic Analysis of Intercollegiate Athletics of the N.C.A.A.* That particular article was published in a journal known as the *American Journal of Economics and Sociology.*

Currently, also with two other college economists, have underway a book entitled *The Economics of Intercollegiate Athletics* and D. C. Heath-Lexington will be the publisher of that.

* * *

[279] Q. Well, in applying the economic theory that you refer to, and looking at models as you described it, and, in particular utilizing your expertise that you have described, your area of expertise in industrial organization, I think you described it, to the area of intercollegiate athletics and to the N.C.A.A., have you reached a conclusion concerning the structure and the organization of intercollegiate athletics? A. I have.

Q. And what conclusion, generally, have you reached? A. Well, my conclusions is that the model that explains best that which has been happening in intercollegiate athletics [280] is a model of cartelization, which is to say that to assume that the N.C.A.A. is a cartel and behaves as such.

Q. Would you—do you use the words "cartel" and "monopoly" in any different sense as an economist, or are they interchangeable, or do they have different flavors? A. Well, a cartel is an organization of firms or individuals who get together to agree on items of joint interest. A monopoly is simply a sole or single seller of a given goods or service.

* * *

[282] Q. All right. In the area of college athletics, then, what are the inputs? A. Well, among the major inputs would be the athletes, the coaches, the stadiums, and things that go into, for example, producing intercollegiate athletics football.

Q. And what are the outputs in intercollegiate athletics? A. Well, the major output that we are concerned with here is intercollegiate football and intercollegiate football is an output, which is produced by combining various sets of inputs and it's an output that is sold.

There is also, however, a further output that is really a derived kind of output, derived from the demand that fans have to attend football games and that is the output of television. There is a key demand to televise intercollegiate football games. That is yet another output that results from the combination of inputs that are used.

Q. All right. As to input, you have referred to the fact that there are restrictions on the input in collegiate sports. Very briefly, what are you referring to on that? A. Well, the N.C.A.A. regulates, for example, the number of athletes that a given university can employ in a given sport. They regulate how much these people can [283] be paid. They regulate how often these people can be used. They regulate the number of coaches that can be hired and so forth. These are all input restrictions.

Q. Now, specifically, though, as you have suggested and we will be focusing on the area of output here, what restrictions are you referring to in the area of output in college football? A. Well, on the output side of the market the N.C.A.A. fixes prices. Testimony that I have heard here and the exhibits that I have read suggest strongly that the N.C.A.A. fixes the prices of television rights. In terms of the quantity of output, the N.C.A.A. regulates, for example, how many games that a university can play, sometimes where they can play them, and certainly when they can play them. The N.C.A.A. regulates the televising of those games.

So on the output side, the N.C.A.A. is engaging in some very significant economic restrictions that are not even customary of some of our more effective cartels elsewhere in the world.

Q. Well, you have stated that the N.C.A.A., the model that fits the N.C.A.A.'s behavior, is that of cartelization. Is it your testimony that that is the case when we are looking at output? A. Yes.

[284] Q. Or would you explain for the Court in what manner the output restrictions that you have referred to are associated by you with cartelization? A. Let me try to provide a couple of examples of other cartels in action, and then compare those to the N.C.A.A.

Consider the Organization of Petroleum Exporting Countries, O.P.E.C., as we call it. O.P.E.C. sets the price of oil, for example, at thirty-four dollars a barrel or whatever. They have also, from time to time, attempted to control the output of oil, although not very successfully.

One could look at another cartel, the International Air Transport Association, I.A.T.A. The I.A.T.A. traditionally controlled transatlantic airplane routes, and would set prices on those routes and indicate how often someone could utilize one of those routes. Now the I.A.T.A. several years ago was very powerful because they succeeded in denying routes to firms that didn't obey their price discipline. Specificially, consider Icelandic Airlines, which was forced to fly only from the United States to Iceland, to either Copenhagen or Luxembourg and could not fly in to Frankfort or Paris and the reason for that was simply that they refused to fix prices at the higher level that the I.A.T.A. had specified.

Those are examples of cartels' attempts to fix prices in quantities, and this is, from an economist's viewpoint, precisely what the N.C.A.A. is doing when it attempts to—[285] in fact, does—fix the fee that is paid for television for a regional game or national game, or when it restricts the number of television appearances or when it indicates, for example, in the television contract relative to exception, precisely when and where and how and under what circumstances one could televise a specific game and a specific situation.

* * *

Q. Well, would you give the Court sort of a definition or an idea what an economist means by "price fixing"? A. Well, by "price fixing," an economist means a price that is fixed artificially and which is not responsive to supply and demand forces in the market place.

[286] Q. And what specifically about intercollegiate athletics or specifically football leads you to a conclusion as to whether or whether or not the price is being fixed? A. Well, one observes in intercollegiate football televising that the same rights fees are being paid repeatedly for first one fee for regional games and another fee for a national game, regardless of what the apparent supply and demand circumstances have been.

* * *

[288] Q. Apart from the game or games between the big teams that we have heard some testimony about, have you also formed [289] any conclusion as to the number of games among teams that don't have a national following that would be available in a free market situation and the geographical range that you would expect those games to be available in? A. Yes, I have.

Q. Would you give that opinion, please? A. Well, it's my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana.

I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that

a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie.

I think there are numerous examples of those regional and local contests that would be very attractive to television stations and that television watchers, the consumers, would [290] be very pleased if those were televised.

* * *

[293] Q. And do all cartels have that effective means available to them? A. No, all cartels do not. If one takes the example of O.P.E.C., O.P.E.C. attempts to control the price of oil, but they cannot stop people from producing oil. If I am in Venezuela and I don't want to follow the O.P.E.C. price, I can go ahead and produce and sell my oil and O.P.E.C. can't stop me.

Q. All right. Would you relate that, please, to the N.C.A.A. as to first what the mechanism is, if there is one, and, second, whether as cartels go, you view it as an effective mechanism? A. Well, with respect to the N.C.A.A., I observed that by taking the rights, the property rights to televising and installing those by rule and regulation as exclusive rights of the N.C.A.A., that they have first, by rule and regulation, made it impossible for anyone else to sell rights to intercollegiate television, live performances, for football.

So, first of all, rule and regulation does that but rule and regulation is made effective by the threat and the actuality of N.C.A.A. enforcement.

Q. Now, let me stop you right now. When you say [294] "threat," do you mean it's necessary that someone come out and say words that we would commonly consider in every day speech as "threats," is that required? A. No. It's rather in many cases simply a perception of what might happen in the financial losses that might be imposed on an institution if they don't follow the N.C.A.A. outline.

Q. Well, continue here with the situation in the N.C.A.A. in that respect. A. The N.C.A.A. is able to impose very, very significant financial losses on an institution that does not follow its particular rules and regulations in this regard.

Q. Be specific. A. Specifically, they can prevent an institution from appearing on television. I have read recently of penalties imposed on the University of Southern California and that for a specific football game.

For example, if U.S.C. were to again play Oklahoma University while they were on probation and if they could not appear on television, that the cost of that might be upwards to a million dollars, depending upon the value of the contract and so forth in that particular year.

So that's a very significant penalty.

Further, however, the N.C.A.A. can, by placing an institution on probation or, in fact, even expelling them, [295] prevent not only the athletes who compete for that institution and that sport from competing for N.C.A.A. championships, but they can impose sanctions upon the athletes in other sports so that an athlete in gymnastics or baseball or hockey or basketball would be unable to compete for a national championship.

Now, that, too, is a financial penalty because the inability to compete in an N.C.A.A. basketball championship results in one not being able to compete for very significant financial rewards. It also results in one not being able to recruit good athletes and it also results in loss of exposure and perhaps some program or lack of a program out in the community and an inability to recruit students.

Q. That affects your input? A. Yes.

Q. All right. Now, would you please evaluate the effectiveness of this enforcement means as compared with that of other cartels? A. Well, I would judge the N.C.A.A.'s

enforcement in the area of football to have been very, very successful. One basis for that is to simply observe that in the entire history of the contracts, and apparently there's been no deviation at all from that minimum aggregate fee, that would be very, very unusual. For example, it does not occur in O.P.E.C. where there is constant price chiseling, where there [296] is constant give and take and some cheating going on. That doesn't seem to have been the case with N.C.A.A.

I could also observe that when a rival—say not a rival—I will rephrase that.

When another institution or another organization, such as the College Football Association, talked about developing a television contract and, in fact, negotiated a possible one with N.B.C., that the possibilities of expulsion from the N.C.A.A., the possibility of severe financial penalties if they went through with that, was sufficient to deter them from adopting that contract.

Q. Have you read the exhibits and heard the testimony about what the N.C.A.A.'s reaction to the C.F.A. proposal was? A. Yes, I have.

Q. And can you state as an economist whether that is one which is predictable or fits your models or whatever your phraseology would be? A. Well, nearly any cartel is unhappy when competition arises, and the N.C.A.A. has been predictably very, very unhappy when people attempt to compete with it or when it is forced to get out into the competitive market place.

Q. Has the manner of response been one that you, as an economist, are used to seeing in this situation? A. Very predictable.

[297] Q. And you have stated more or less empirically that the enforcement process has been effective. As a matter of pure analysis, though, is it one that you would anticipate to be

effective? A. Yes, given the various sanctions and financial penalties that the N.C.A.A. can impose, one would predict that it could be rather successful.

Q. What about the option of the individual member to withdraw from the organization, the N.C.A.A.? A. Well, I don't, as an economist, view that as a viable option. I don't believe that the N.C.A.A. is, from an economic standpoint, a voluntary organization. Doctor Davison, the president of the University of Georgia, suggested that it was the only show in town, if one wanted to be a major athletic power, or even a major athletic participant. I also would cite what I think to be a very telling comment made by C. Peter McGrath, who was a vice president of the University of Minnesota, when he was testifying before the U.S. House of Representatives hearing in 1978. He suggested that membership in the N.C.A.A. was no more voluntary than payments to the Internal Revenue Service were each year, in fact, income tax and I think that's apt.

* * *

[300] Q. What determination have you made, then, as to what the market that is relevant in that determination is? A. Well, it is my professional opinion that the relevant market here is—

Q. Is that an economic term, by the way, "relevant market"? A. Yes, it is.

Q. Proceed. A. —that the relevant economic market here is intercollegiate football television and that one can differentiate that particular market from other markets that exist on the [301] basis of a lack of substitutability between that to some degree or another, and other possibilities, other goods and services and other kinds of television that might possibly appear in that.

Q. And what is your—at least your judgment as to the substitutability? A. Well, I can perhaps best answer that by giving you an example.

It would be my professional opinion, based upon ratings information that I have seen, that the substitutability between a Saturday afternoon telecast of, let's say an O.U.-Nebraska football game, and a Saturday morning Bullwinkle cartoon would be very small.

Q. When you say the substitutability of those two programs is very small, that's a way of saying what? A. That the two are not in the same economic market.

Q. And are you talking now from the viewpoint of the viewer or the advertiser? A. Well, I am talking about the viewpoint of the advertiser, but the advertiser derives his demand from these things from what the viewer says that he wants to see.

Q. And is that what you then referred to as a derived demand? A. Yes.

Q. What is a derived demand? [302] A. The derived demand here is a demand which one has because of something preceding it and in this case the demand of advertisers for television advertising time is a function of primarily what kind of people and how many people they believe to be watching a particular program. So the demand for advertising time is primarily a function of the television watching that individual's undertaking.

Q. And that is based on such information relating to ratings and the like, as you have seen? A. Yes.

Q. And have you — has it been your roll in the — in this presentation to make truly detailed analysis as to those kinds of numbers? A. It has not.

Q. But have you observed enough to be able to form with some confidence the conclusion that you have given? A. Yes, I might give one example here.

I have seen ratings information that suggests that, in fact, directly indicates that the price of a minute of prime Saturday

afternoon television time, which is used for intercollegiate football, is about two and a half times the price which one must pay for advertising anything else.

Q. Are you talking about the overall price or the price for each thousand viewers that you have? A. We are talking about per thousand viewers.

[303] Q. Would you expect to see that if they were competing in the same market? A. No.

Q. Why not? A. Well, there's a great deal of lack of substitutability here. If two goods are high substitutable for each other, more often than not their characteristics will be similar and their price will be in the same neighborhood, but that is not the case here.

* * *

[304] Q. What conclusion have you reached as to whether the N.C.A.A. has and is exercising monopoly power in the area of college football television? A. My conclusion is definitely that the N.C.A.A. is exercising monopoly power; that it is a monopolist in the area of intercollegiate football televising, and that it is not behaving in any sense in the way that one would expect if we had a free market.

Q. Well, generally what leads you to the conclusion that monopoly power is being exercised here? A. Basically two kinds of considerations.

First, the price results that I see, rigid prices, prices that are not responsive to supply and demand influences. I would again cite the example of the O.U.-U.S.C. game versus the Appalachian State versus The Citadel game. That's very strong evidence that the desires of football consumers out [305] there in terms of who's watching television are not being followed and, hence, that the market is being stymied and, in fact, being rigged.

The other kind of major source of support for my conclusion would be what's happening in the output side of the

market, relative to the number of games being televised and the selection of games, when they are being televised, and so forth.

* * *

[306] Q. All right. What are the barriers to—first, we—well, what are the barriers to entry that you perceive in the area of the sale of college football? [307] A. Well, the primary written barrier relates to the assignment by the N.C.A.A. to itself of the property rights for televising football contests and that is part of the rule and regulation of the organization and individuals who do not choose to follow that can be significantly penalized. So the second part of this, then, are the penalties that can be assigned. They are very significant. Financially they are very large.

So not only is there rule and regulation, but there are very significant penalties and even threats of penalties that can be assigned that would make the barrier to entry very, very effective.

Q. Well, in comparison with the situation that you have seen in the analysis of other monopolies, how effective is the barrier to entry that you have just described in the N.C.A.A.? A. I would judge professionally this particular barrier to entry to be very, very large and significant and has been very successful. I would, again, compare this particular cartel to other cartels, such as, for example, O.P.E.C. O.P.E.C. has not been successful in maintaining the price of oil.

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[308] Q. All right. Go ahead. You were stating how the barriers to entry to N.C.A.A. compare as barriers to entry that good in cartels, generally. A. I think the barriers to entry that the N.C.A.A. has established in terms of rules and regulations and in terms of its conduct, are very large and significant. They have been very successful and that those are larger than nearly any other cartel and more successful than nearly any other cartel that I could mention.

* * *

[313] Q. Now, second argument, or maybe it was chronologically first, and I may have mislead you, but is the question as to whether the restrictions on output, as you put it, on the amount of college television that is made available, does that have an effect on increasing the attendance, the live [314] gate attendance as we have referred to it at the games?

First, I guess I better ask you, from your analysis and from your observations, do you accept that argument factually? A. I do not.

Q. And why not? A. Well, one of the reasons that I do not accept the argument that televising football games could hurt football attendance at some institutions is that I observe in some other sports that has not been the case. We have heard testimony this morning from Mr. Neinas concerning what has been true in basektball attendance and so forth, and so I don't think that it necessarily follows that that would be the case at all.

I also have some additional experience on this. One, I have seen various regression results with respect to football attendance at division one-A institutions that suggested that the attendance if favorably influenced by television appearances.

* * *

[316] Q. Would you tell the Court about that, please. A. Earlier I mentioned very briefly an experience that I had at Illinois State University during my time there as an economist. I had a defensive end on the team in my economics class and he was an honor student in economics and we asked the question as part of his senior thesis, "What [317] are the determinants of football attendance at Illinois State?"

Q. Now, before you go on, is Illinois State in the big time ranks in college football, or not? A. They were division one-A until very recently and they are now in division one double A, and a member of Missouri Valley Conference and Missouri Valley Conference—most of the teams are division one double A.

* * *

[319] Q. All right. Would you tell the Court, in whatever detail is required, what you did, what kind of data you gathered and what kind of econometric functions you performed regarding that to this date? A. What I was attempting to explain was football attendance at Illinois State and I gathered data over about fifteen years and then attempted to explain football attendance at their games on the basis of the price of their tickets, how successful the Illinois State team was in terms of win-loss [320] percentile, the opponent who they were playing, and we went back and looked at the local newspaper to determine what the weather was on those particular days, whether it was raining, what the temperature was, and so forth. We examined the sports pages to attempt to determine whether or not there was a really big national game on that particular day that would gather a lot of interest.

Also, since University of Illinois is only fifty miles away, we entered a variable which recognized whether or not the University of Illinois had a home game.

Q. Is that a school of C.F.A. dimension? A. Yes.

Q. They are not a member, but that is within that qualification, are they not? A. Yes.

Q. Proceed. A. The results of the analysis suggested that doubt—significant predictor of Illinois State football attendance was whether or not they had a good team, whether they were winning football games, and price had some influence. Also who they were playing was important, but whether or not they were playing the game in the evening was not important. This suggested they could play in the day very directly because the variables that were reflecting whether or not there was a big time football game on during the afternoon, or whether [321] the University of Illinois was at home were simply not significant.

Those particular variables didn't tell anything about Illinois State football attendance.

Our conclusion was that—

Q. What about the effect of television? A. The effect of television variable was zero. Whether or not there was a big time game on that Saturday afternoon was simply not a significant determinant of Illinois State football attendance.

Q. What did you conclude from that? A. The conclusion was that people who attend Illinois State University football games and at that time during most of the time of this analysis it was a division two institution and in that regard they did attend for reasons that are quite different than the reasons that one might attend, let's say, an O.U.-Nebraska game or U.S.C. versus Oklahoma; that they attend because they have local interest, they probably know the players and coaches very directly, that they have an attachment to the institution and they would like to see live football, but yet not have to travel fifty or a hundred miles, or whatever range of miles, to go to the game.

Q. Based on your study, did you make a recommendation to the school and the team as to when they might play their games? [322] A. Yes. We met with the athletic director, who had been very gracious to us in supplying a lot of data, and showed him the results and partially as a result of this, they changed and, in fact, currently now most of their games are during the afternoon.

• • •

Q. Let me ask you as an economist and analyzing the situation here as to what you view the impact or the significance of the new contracts on the overall structure and practice that you have described here? A. From an economist's standpoint, there seems to be very little difference between the new contracts and the old contracts. The old contracts talk about freely negotiating [323] fees and the likes. So do the new contracts.

Under the old contracts there was — from an economist's standpoint — price fixing and no competition. There is nothing in the new contract that I can see that would make that any different.

Q. Do you see any evidence in the contracts and the ground rules and the behavior of the competitive situation as far as bidding between the two networks is going to be significant? A. No, and, in fact, I would go further than that and say that as I have read those contracts, while I am not an expert in television contracts, it does appear to me that the contracts go out of their way to reduce, if not eliminate, competition between the two networks.

Q. Now, sir, as to — what, then, just briefly, would you summarize for the Court very briefly your conclusion as to whether then the situation under the new contracts, as you view it, as an economist views it, to be a change? A. I don't see any substantial change in the new contract at all.

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Cross Examination by Mr. Harry:

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[342] Q. Now, has the N.C.A.A. television football plan been essentially similar in form, let's say since 1970? A. I believe that generally to be the case, although I would not want to say that that were true on every specific instance.

Q. I want to look at these three articles that you testified about on your direct examination, Doctor Koch, this morning.

The first one comes from the Economics of Big Time [343] Intercollegiate Athletics written by you while you were at Illinois State in 1971, is that not correct? A. Yes.

• • •

Q. I am going to read a statement at the bottom of two fifty-one, Doctor Koch, and ask you about this.

"Since all teams cannot simultaneously have winning seasons, it is intelligent policy for the cartel either to require sharing of net revenues among all university firms, winners and losers alike, or to promote equality of compensation." That is essentially your view, is it not? A. That is a view of what I would do if I were a cartel and typing to maximize the benefit to the cartel. It doesn't necessarily imply what I think is a good policy as an economist.

Q. But you do think that the attractive power of football to either live attendance or television viewing requires competitive balance among the teams so the games are good? A. Competitive balance is necessary in any league if [344] it is to be attractive to fans.

Q. And, Doctor Koch, in your other article The N.C.A.A. Cartel—A Troubled Cartel In The Law and Contemporary Problems that you testified about, I think that was written in the mid-seventies, wasn't it? A. Yes, sir, 1973, I believe.

Q. And I want to read from a hundred and thirty-seven there: "Competition is an indispensible input to the success of intercollegiate athletics, and when such an ingredient is absent, spectators lose interest in the game in question," correct? A. Yes, sir.

Q. "It is in the best interest to the N.C.A.A. and its component members to strive by regulation and enforcement to make competition reasonably equal among members that choose to compete with each other," correct? A. I agree.

* * *

[348] Q. Did you perform any statistical or empirical studies in your work in this case? A. For this particular case, no.

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[373] DEPOSITION OF JAMES R. SPENCE, JR.

MR. MUCHMORE: We will be reading from the deposition of

— will read deposition of A.B.C. Sports, Inc., by James R. Spence, Junior, which was taken on February 17th, 1982.

THE COURT: I'm sorry, give me that date again.

MR. MUCHMORE: February 17th, 1982, at the office of A.B.C. Sports, Inc.

* * *

"BY MR. COATS:

"Q. State your name for the record, please? [374] "A. James R. Spence, Jr.

"Q. Mr. Spence, what is your business or profession? "A. I'm senior vice president of A.B.C. Sports, Incorporated.

"Q. How long have you been in that capacity? "A. Since January, 1978.

"Q. What was your work prior to that time? "A. I was vice president in charge of program planning for A.B.C. Sports immediately prior thereto.

"Q. For what period of time? "A. From the fall of 1970 up to January of '78."

* * *

"Q. How long have you been involved in the televising of N.C.A.A. college football games? "A. It depends on what you mean by 'involved.' [375] In a management executive capacity, since the fall of 1970."

(Page 9, line 6 through page 24, line 17).

"Q. Since 1970, generally what has been your involvement and your experience with the N.C.A.A. telecasting of football games? "A. Well, the primary role that I have fulfilled since then is as a part of the group that is involved in the scheduling of our telecasts. My role changed a little bit come 1978; but, from '70 to '78, I was administratively involved in the scheduling of telecasts.

Since then, my responsibilities have increased, and I am involved both administratively and from a production standpoint.

"Q. Have you been involved in the negotiations of the contract with the N.C.A.A. during that period of time from 1970 to the present date? "A. Yes."

"Q. Mr. Spence, let me hand you what has been marked for identification as Plaintiffs' Exhibit seven and I ask you to review that briefly and tell me what it is. "A. This is the agreement between A.B.C. Sports and the N.C.A.A. covering the 1982 through 1985 seasons.

"Q. Can you tell us when that document was executed? [376] A. Yes.

"Q. When, please? "A. February 10, 1982.

"Q. The copy that I have given you there, as part of Plantiffs' Exhibit Seven, as typed at the end of it, has your name with a signature symbol, indicating that at some time you have signed it. Is that so? "A. Yes, it is.

"Q. Do you know whether that contract has been signed by anyone for N.C.A.A.? "A. I do not know that.

"Q. Have you received back from them a signed copy? "A. I don't believe we have, no.

"Q. As far as you know, is that contract in full force and effect? "A. Yes.

"Q. Have you had any conversation with anyone at N.C.A.A. in regard to when the contract would be signed by N.C.A.A.? "A. No.

"Q. And your testimony is you do not know whether they have ever executed it or not? "A. I do not know whether they have signed the paper or not, no.

[377] "Q. Let me hand you what has been marked for identification as Plaintiffs' Exhibit Six and ask if you can tell us

what is, please? "A. This is the agreement between A.B.C. Sports and N.C.A.A. covering the 1978 to 1981 N.C.A.A. football seasons.

"Q. Is that a contract also to which you are a signatory? "A. Yes, it is.

"Q. And although the copy we have there as Plaintiffs' Exhibit Six does not reflect a signature on behalf of N.C.A.A., I assume the contract was executed at sometime and performed? "A. I believe it was executed by the N.C.A.A. and it was performed, yes.

"Q. In both of these cases, both of the documents here, were you involved in the negotiation for those contracts? "A. Yes.

"Q. Each of the contracts contains a provision for a minimum aggregate compensation to be paid to the participating N.C.A.A. member institutions in different amounts.

I take it from the contracts—and I hand them to you, if you need to look at them—that in both [378] cases that is the amount of money guaranteed by A.B.C. to the institutions and the N.C.A.A. for the exclusive right to televise college football games as stated in the contract, is that correct? "A. I believe that is correct, yes.

"Q. I find nothing in the contracts which defines how much money is to be paid to each institution participating in a contest which was televised, and so I ask you how, for example, under the contract which has just expired reffered to here as Plaintiffs' Exhibit six, were the rights determined, or the rights fees determined for a national televised college football game of division one teams?

"MR. HARRY: I have no objection to the question, Andy, but to your comment to the effect that the contract does not provide how the price is to be determined. And with that reservation of form for the record, please go ahead and answer it, Mr. Spence.

"MR. COATS: Yes. "A. Our arrangement with the N.C.A.A. calls for us to deal with the member institutions, with the particular host institutions of the games we televise, so taking a national telecast, we would deal with the host institution and contract with that institution, and in terms of the right prices that would be paid to that institution for that game, it would be worked out between A.B.C. and the [379] host institution.

"Q. How is it determined what the amount will be? "A. Well, you take — take the last season, for example.

"Q. 1981? "A. Yes. The figure for a national telecast, as I recall, was six hundred thousand dollars. I determined that figure.

"Q. How did you determine it? "A. I looked at what our commitment was for the '80-'81 seasons, and the commitment for '80 and '81 escalated over '78 and '79, and I just thought based on what we were paying for nationals in '78 and '79, that in combination from the increase for '80, '81, that six hundred thousand dollars would be a fair, proper figure for a national telecast in '80 and '81, and that's how I arrived at it.

"Q. Did you come to a similar determination about the regional telecast fee? "A. Yes.

"Q. What figure did you come up with there, do you recall? "A. It was four hundred twenty-three thousand dollars approximately, I think, in '80 and '81. One addition to my last answer.

[380] "Q. Sure. "A. In terms of the establishment of the regional fee for '80 and '81, after I'd come up with the six hundred thousand dollars for the national fee for each of those years, we knew how many nationals we had to televise each year, and multiplying that number by six hundred thousand dollars, we knew what monies were left from the minimum

aggregate for regionals, so that is really how we evolved the four hundred twenty-three for each regional.

* * *

[384] "Q. Were the national rights fee and the regional rights fee set in that way over other years? "A. You say 'in that way'?

"Q. Yes, in the way that you just testified that you did in 1980 and '81.

"MR. HARRY: By him, Andy?

"MR. COATS: Yes.

"Q. At this point in time, is that the way it has been done? "A. No.

"Q. Tell us how it was done say in '78 and '79, if you know. "A. My recollection—again, I am a bit hazy on this—is that the N.C.A.A. suggested potential rights fees to A.B.C. Sports.

"Q. Do you know how that was done—in what manner it was suggested to you? [385] "A. In—it varied.

"Q. Tell me then of some of the ways in which it was suggested. "A. Well, I am—in certain time frames, it was done in writing, certain times, verbally.

"Q. Would it be fair to say, then, that 1980 and '81 is the first time it was decided unilaterally by you or by A.B.C.? "A. No. I can't testify. We have been involved with college football since '66, and then we were involved earlier than that. And, a, I can't testify to the years I really wasn't involved directly in this, and, b, I don't recall exactly what happened in the early seventies.

"Q. Do you now recall any other years in which it was set as you said it here, by simply making the decision and announcing it to N.C.A.A.? "A. I don't recall any other years, no.

"Q. You do recall that in '78 and '79 that the number was suggested to you by someone from N.C.A.A.?

"MR. HARRY: I am going to object to that, Andy, as a mischaracterization of what he said.

"MR. COATS: This is what I am asking, if that is what he said now. "A. Can you ask the question again, please?

"Q. Yes, sure.

[386] I understood your testimony to be that for the setting of rights fees for the '79 season or for the '78 season, that it was not done, as you have done it here, where you decided, but rather, the figures were suggested to you by somebody at N.C.A.A. Is that true? Is that what you testified to, first of all? "A. Well, I said back a number of minutes ago, our arrangements are with the institutions, in particular the host institution. But it is factual that, to the best of my recollection, in '78, '79, the N.C.A.A. suggested potential rights fees.

"Q. And they had done so in other years? "A. Yes.

"Q. Was a rights fee determined by somebody, whether by A.B.C. or by N.C.A.A., in every year that you have been involved in the process? "A. A.B.C. Sports determines the rights fees.

"Q. Then the suggestions from N.C.A.A. were simply that, and the decision then—you took that into consideration, but A.B.C. Sports made the decision; is that right; is that what you are telling me? "A. I am saying it was our decision as to what we offered the member institutions, yes.

* * *

[392] "Q. So for our purposes, then, you were involved in '77, '78, '79, '80, and '81? "A. Yes.

"Q. During any of those years, laying aside semi-national situations, has there been any deviation from, for any reason, the national rights fee or the regional rights fee established for

division one competing teams? "A. I don't recall any, no. There may have been some. I don't recall any.

"Q. That's sort of what I need to find out. Can you now think of any circumstances under which that would occur, where one of those deviations might have occurred that you think might have happened? "A. I don't believe any deviations occurred in the '77 to '81 period, no.

* * *

[420] "Q. Under the new two-network system under which we will be operating for the next four years approximately, how will the rights fees be set under that system? "A. We are going to establish the fees with the host institutions. Whether or not the N.C.A.A. plans to make suggestions or recommendations to us on that, I do not know.

"Q. Will you do so as you have in the past, that is, by making that sum a function of the total amounts to be paid during any one year? "A. Yes. Take a minimum aggregate sum and subdivide it.

"Q. Will that be the same for C.B.S. as it is [421] for A.B.C.? "A. I can't speak for C.B.S. I assume so.

"Q. But they have to pay a like amount as a total figure for the season, do they not? "A. I sure hope so.

"Q. There was some discussion of obtaining what we might call a 'favored nations' clause, I think, during negotiations; is that so? "A. Yes.

"Q. And the purpose of that clause would have been to do just this thing, so that A.B.C. didn't have to pay much more for a national game than C.B.S. would, or a regional game?

"MR. KESTENBAUM: I don't understand the question, because the contract, as I understand it, doesn't provide for a fee for regional or national.

"MR. COATS: I understand it doesn't. "A. The favored nations point that we were making related to the aggregate sum, not to the individual sums to the institutions.

"Q. We understand that we each have a different position on how that works. But the point is that from your viewpoint, the favored nations clause was applicable to the total season, and it was your position that A.B.C. not pay more for a total season than C.B.S. [422] does, is that what the favored nations dispute was? "A. It was our position that we should not pay more than C.B.S. for the same package of games that the N.C.A.A. was selling us that they were selling to C.B.S.

"Q. What came of that discussion? "A. There was a resolution of that discussion.

"Q. How was it resolved? "A. Let me think: we ultimately agreed to increase our agreed upon rights figure by 'X' amount of dollars up to a maximum level, and if the N.C.A.A. in its negotiations with C.B.S. was able to realize revenues beyond what A.B.C. had agreed to with the N.C.A.A., that our level of compensation, our aggregate compensation would be increased accordingly, but up to a maximum level. And we had a ceiling put on.

There was also a down side part of that, too.

"Q. And the purpose of that is to establish some parity between the networks, so that you are paying roughly the same kind of sum for the same services?

"A.B.C.'s purpose?

"Q. Yes. "A. Yes.

"Q. Under the two-network system, will there [423] be any occasions where C.B.S. and A.B.C. will be competing for a particular game? "A. Yes.

"Q. Describe how that would occur. "A. In the first stage of game selection, as I mentioned before, the so-called 'move' stage, it is quite possible that both A.B.C. and C.B.S. would want the same two teams, the same game to move from its established date to a date on which a game doesn't exist.

"Q. Let's explore that a little bit. Let us assume that the schools have agreed to move at the request of A.B.C. The schools wouldn't know and A.B.C. wouldn't know whether they would ultimately wind up being on A.B.C. or not, would they? "A. They wouldn't know until it was established whether there was a similar request from C.B.S. If there was no conflict, then the game would be in place on A.B.C.

"Q. Is it possible that both you and C.B.S. would ask a school to move but to move to different dates? "A. Yes. In a general sense, there are a number of games that both networks would want to televise.

I thought your question was more specific than that. That is why I talked about the move, the [424] potential conflict in that area.

"Q. Let us take it on through. Let's assume that some of the schools decide to move and some do not, and you get into the next stage. Would there be any situation in the next stage where you would be competing with C.B.S. for a particular game? "A. Competing with or both interested in?

"Q. Where you would be actually competing for it, where you would, both have a chance to, say, bid for the game; anything of that kind? "A. No.

"Q. Is there any circumstance under the proposed or, I guess, new, ongoing two-network television procedure whereby A.B.C. and C.B.S. would be bidding for games, in terms of bidding for rights fees for games? "A. It is certainly possible under the terms of our agreement and C.B.S.'s agreement. First of all, a school doesn't have to go on television.

"Q. Of course. "A. Secondly, it is certainly possible that a particular institution would not choose to make a deal with us or C.B.S.

"Q. Well, that is what I want to get to.

"Let's take a game. For example, let's take [425] the Alabama-Auburn game and it turned out that it was a game that both you and C.B.S. wanted. Would there be any time where you would both go to Alabama, if it was the home institution, and you would say, 'We will pay you 'X' dollars,' and C.B.S. will say, 'We will pay you 'Y' dollars,' and they would take whichever one offered the most; is that possible under this situation?" A. Let me answer your question this way:

"The system is not set up in that way. You ask me if it is possible. I think the answer is yes.

"Q. Let me ask: is it possible under the terms of the agreements, your agreement with N.C.A.A., and C.B.S.'s agreement with N.C.A.A., to do that? "A. I don't know if I would qualify the answer to that. Maybe that is a question to be directed to the N.C.A.A.

"Q. Oh, it will be.

"Take the instance that I just mentioned, if you will, and explain to me how, under the terms of the agreement, it could occur that both networks would be there bidding for the game with, as a corollary, of course, the right of the host institution to choose the network that offered the most money. "A. Well, I am not sure — this is why I think [426] the question should be directed to the N.C.A.A., in terms of what the obligations of the member institutions are to the N.C.A.A. and the N.C.A.A. package.

"Q. You say it was possible. I ask you now, is it possible under the terms of the agreement?

"Are you going to do that under the terms of your agreement? "A. I don't think it is possible under the terms of the agreement.

* * *

[447] "Q. Mr. Spence, you have always dealt with the college football under the overall terms of a N.C.A.A. contract, have you not? "A. That's correct, yes.

"Q. Except, of course, for bowls or games that aren't in the regular season? "A. That is correct.

"Q. In your view, based on your experience, is it preferable for A.B.C. to deal with N.C.A.A. as an organization that more or less sets up this mechanism that you have been testifying about in the form of a package, or is it better for A.B.C. to deal individually with each college without interference by any association? "A. That's really a difficult question to answer [448] without knowing what elements would be involved if there were no N.C.A.A. contract. It would be really difficult to answer. One network, two networks, three networks; how many games, et cetera, et cetera. And I will say, without some control over college football television, that in my opinion college football on network television would not be a very viable entity.

"Q. Could you explain that a little more? "A. Well, I am relating in part to the discussions earlier concerning head-to-head television.

"If you had A.B.C. on against C.B.S. and let's say A.B.C.—if there were no controls, there could be three networks doing college football at the same time, there could be cable telecasts, et cetera, and the ratings would certainly suffer.

"And, in my opinion, the marketplace would have difficulty supporting properly network college football.

"Q. In another factor, in your judgment, the fact that the N.C.A.A. has an entire set of rules dealing with eligibility and rules of play and fairness of competition that make it a viable and desirable product on television? "A. In part, yes."

(Page 105, line 5, through page 113, line 15.)

[449] "Q. Now, A.B.C., I take it, has for the last sixteen years had the exclusive rights to show the college football of N.C.A.A. members on television, has it not? "A. No.

"Q. What have been the non-exclusive aspects of that? "A. Well, there are the exception telecast provisions referred to earlier, there are delayed telecasts that are outside the realm of our agreement.

"Q. Any others? "A. I think those are the main ones.

"Q. What from A.B.C.'s point of view is the desirability of the exclusivity feature? "A. The exclusivity is really the essence of our agreement, and has been with the N.C.A.A., and will continue to be. Exclusivity in terms of a new contract, games we have purchased in the old contract, exclusivity over the entire season. It is important because it allows us to have a product which is special and unique to A.B.C. Sports and now to A.B.C. and C.B.S. Sports as opposed to one that is available throughout the marketplace. And that tracks back to the bottom line, it tracks back to image, et cetera.

"Q. In your experience, does that produce a better product, because you can put more into it by way of [450] promotion development and expect that you will get that back? "A. To a degree, yes, yes.

"Q. You have been asked a lot about minimum aggregate price as it appears in these contracts between A.B.C. and N.C.A.A. What is the reason for that? "A. What is the reason why minimum aggregate is there?

"Q. Yes. Is is desirous from your point of view? "A. The sums referenced in our agreements over the years relate to the sum of monies that we have reached agreement on with the N.C.A.A., they have been set forth as minimum sums, meaning that certainly we could pay monies beyond the minimum if we so opted.

"Q. I take it over the years, these sixteen years, there has always been a limited term of years for which a particular contract between A.B.C. and N.C.A.A. would run, like one year, then two years, then four years? "A. It's been two-year increments, save the contract that ran from '78 to '81 and the current deal.

"Q. Is there any reason for that kind of time limit, rather than a perpetual contract? "A. I think you'd be better equipped to answer that question than me. If you want my answer, it is. I believe the N.C.A.A. has felt that, you know, the more [451] frequently they negotiate, the more advantageous the terms would be to the N.C.A.A.

"Q. Mr. Spence, have these features of the N.C.A.A. contracts with A.B.C., that is the exclusivity, minimum aggregate price and numbers of years, been features that have been incorporated and used in other sports contracts by A.B.C.? "A. What did you say, limited term of years?

"Q. Minimum aggregate and exclusivity. Let's take it under other sports contracts. Do they have those features? "A. No, not all of them.

"Q. Some of them? "A. Yes.

"Q. Are you saying that not all the other programs have all these features or all these other programs have some of these features? "A. All the other programs have some of these features.

"Q. Does that depend on the particular business relationship and bargaining between you and the supplier of the product? "A. Yes.

• • •

[462] "Q. Mr. Spence, during the last decade, during your intensive experience in this business field, has the exposure of sports on television generally greatly increased? "A. Yes.

"Q. Could you describe that somewhat for the court? What was it like when you started and what is it like now? "A. Well, there's been a tremendous proliferation of activity. The number of hours on the three major networks has increased dramatically over the years, the type of programming presented by the networks has increased in leaps and bounds, quantum leaps.

• • •

[464] "Q. Is the two-network concept that Mr. Coats was questioning you about sufficiently shaken down in detail so that you can confidently now say how it will operate once it starts next fall? "A. Not one hundred percent, no.

"Q. In other words, there are some questions that may arise as you actually get, like in any contract, into working it out? "A. I think there will be some, you know, bugs that will have to be shaken out of the rug, so to speak.

"Q. It is really totally new in sports television, isn't it? "A. Yes, it is, this particular two-network arrangement is.

"Q. N.F.L. is totally different, because the league there makes up the assignment of television, doesn't it? "A. The league establishes the schedule of games for the networks, yes.

"Q. The network then is told by the league which games it is going to televise? "A. With very minimal consultation, yes.

"Q. Now, getting back to the question that [465] Mr. Coats objected to. It is your strong belief, is it not, that the exposure of college football on television during the regular season will greatly increase under the two-network arrangement?

"MR. COATS: Note my objection.

"Q. I think you can answer that. "A. The answer is yes.

• • •

[466] "Q. Have you encountered situations where there has been overexposure of sports on television during your experience with A.B.C.? Not just by A.B.C., but any network? [467] "A. Yes.

"Q. And has that caused the product to deteriorate? "A. Yes.

"Q. Could you give us some examples? "A. College football.

"Q. That is a good one.

"Any others? "A. I think we are at a point with boxing on network television, there is overexposure of boxing. It hasn't necessarily started to demonstrate deterioration, but I think we are probably close to that point.

"Tennis. Tennis is a major example of overexposure. And golf, I think, is another example.

"Q. Mr. Spence, when you referred to the overexposure of college football earlier, what did you mean? "A. Well, what I meant there was that in our opinion, the increased exposures in the two-network concept for from '82 to '85, twenty-three exposures to twenty-eight exposures with the two networks, with the appearance limitations not changing all that much, I think there is an overexposure in the new contract; and particularly in the old contracts, when we did twenty-three exposures, it was our opinion that twenty-three exposures was an excessive number of [468] exposures.

"Q. What would be the effect of adding the prime time Saturday night exposure of college football during the regular season on still a third network; would that enhance overexposure? "A. Yes, I think so. I think it would — if that — are you talking about on a network basis?

"Q. Yes. "A. I think that would have — would result in a major marketplace problem for college football, three packages on the market, and also I think it would necessarily hurt the ratings of probably all the packages."

[469] "Q. Has A.B.C. ever done any studies to determine the impact of regular season college football games on television on the live attendance of other games? "A. I don't believe we have, no.

"Q. Having been in the business now for some many years, do you have any judgment as to how it impacts on live attendance? "A. I just — I have an opinion.

"Q. All right. Just tell us your opinion. "A. My opinion is that if there were no controls on college football television, or to put it differently, if you had carte blanche in terms of team selection, that that would end up having a direct negative impact on attendance at a lot of games in this country.

"Q. Now, you said during your testimony from Mr. Harry that college football has some things that make it unique.

"To obtain the right to televise that rare unique package, you have to deal with the N.C.A.A. do you not? "A. Yes.

"MR. COATS: I believe that is all."

[4] **(EXHIBIT 131-A)**

DEPOSITION OF KEVIN O'MALLEY,
DEPOSED FEBRUARY 18, 1982.

KEVIN O'MALLEY,

called as a witness, having been first duly sworn by the Notary Public (Alice Pizzo), was examined and testified as follows:

Examination by Mr. Coats:

Q Please state your name, please, sir. A Kevin O'Malley.

Q Where do you live, Mr. O'Malley? A 400 East 56th Street, New York City.

Q Mr. O'Malley, what is your business or profession? A Executive producer of college sports for CBS Sports.

* * *

Q How long have you served in that capacity? A With that specific title, only in the area of about seven months.

Q What did you do prior to that time? A I was vice president of program planning for CBS Sports.

Q How long did you serve as vice president of planning? [5] A From October 1977 to—approximately four years.

* * *

[8] Q Let me also show you document 192 and ask you what that is. A This is the agreement between the NCAA and CBS. I believe it is the finalized agreement. I am absolutely certain of that.

Q Then this document No. 43 is a sort of analysis or synopsis, is it, of document 192? A I believe that the document 43 is a characterization of the contents of the agreement over the four years in simplified form for internal purposes.

Q Do you know when this document No. 192 was signed? A I don't know specifically, no.

Q You were not involved in the actual finalizing of the document, the signing of it? A I was not involved in signing it, no.

[9] Q What was your role in the finalization of the document? A I was present when the final negotiations when the specifics of the agreement were negotiated and in some regards participated in that negotiation.

Q How were the total rights fees referred to in paragraph 2 of the 192 document and on the front page of the 43 document, how were they determined? A My recollection is that at the session held in Denver, Colorado, at which CBS was awarded one-half of the football package for the four years involved, that the total number which we bid at that time, which is the $131,750,000 referred to, was divided up in increasing sums over the course of the four years to reflect a greater revenue potential, et cetera.

Q How was the original number calculated? A You mean the number that we bid?

Q Yes. A The number was calculated on the basis of an internal process whereby potential sales were evaluated, including the costs of production, personnel required, costs attendant to televising football, an analysis of what the marketplace would bear in terms of advertising and also a question of what we thought [10] would be a winning bid in competing with NBC for the rights to one-half of the package.

Q The figures that are shown there, does that constitute the bid? A Our bid was the 131,750 figure.

Q As a part of that bid, was the allocation set forth on a yearly basis. A No, it was not.

Q It was a total number bid for the four years? A With the understanding that — we asked at the time of the bid that the figures escalate over the course of the four years and not be constant.

Q Who determined or how was it determined how that total bid would be allocated on a yearly basis? A How the figures were specifically arrived at in terms of exact dollars, I don't recall. It was basically agreed by the Negotiating Committee of the NCAA Television Committee that this escalation and rights on an annual basis was permissible and then I believe that our business affairs people met with the — representing the Television Committee settled upon those numbers.

Q There was some intercourse between your people and the NCAA people? A Yes.

[11] Q Do you know that the ABC package is the exact same figures? A Yes, I have been told that.

Q Do you know how that came about? A My understanding was at the time that we were making our bid against NBC for the other half of the package, the ABC half of the package had basically been negotiated and that when we asked at the time we were to present our bid, we asked representatives of the NCAA Negotiating Committee what were the circumstances under which we were making the bid relative to the figure they had settled upon with ABC, their reply to us, as I recall, was that ABC had agreed with them that should the second half of the negotiation result in a higher figure, that ABC would step up to meet that figure; should it result in a lower figure, that the ABC requirement in terms of dollars would be reduced to the figure negotiated in the other half of the negotiation.

Q Do you know in this case what was done? Was ABC's raised, lowered, to meet yours, or do you know? A I don't know for certain.

Q This contemplates the payment, let's say, in the first year of $29,500,000. How is that to be paid? [12] A It is paid in individual game fees to the institutions involved in the games.

Q Can you tell me how it would be determined how much is to be paid for, say, a national division game next year?

MR. VRADENBURG: Are you asking how it will be determined or has it been determined?

MR. COATS: How it will be under the '82 proposal. I assume they haven't done it.

MR. HARRY: I object to the lack of foundation. It calls for future speculation.

Q Now you may answer. A When the renegotiation is complete, again, a special convention in December called for renegotiation involving the number of games involved for Division I-AA NCAA institutions. When that renegotiation is complete and it is clear to us the total number of national and regional games in all divisions of the NCAA which must be carried under the plan, we will then set figures for rights fees for national games, figures for rights fees for regional games, figures for rights fees for games of Division I-AA institutions participating in the plan, and also a separate amount of money set aside for incentive payments which are to be made to schools which comply [13] with requests by the network to move their games to unusual dates.

Q I take it that the total of those that you have just spoken to would be not less than $29,500,000 for the 1982 season? A Yes.

* * *

[42] *Examination by Mr. Harry:*

MR. HARRY: I would like to get that marked [43] as an exhibit. Mark that document as Defendant's Exhibit A for identification.

(Document headed "Notes of Meeting with Kevin O'Malley and Beano Cook, CBS" marked Defendant's Exhibit A for identification, as of this date.)

Q Mr. O'Malley, you might look at that memorandum. It doesn't have a date on it, but it refers to notes of a meeting with Kevin O'Malley and Beano Cook of CBS and we believe the obvious, being Mr. Neinas, refers in the second line of the text to a meeting which took place on December 10th, which we believe to be December 10, 1980. However, I will ask you if you recollect the meeting and can place the date. A I can't place the date specifically. I do recall that Mr. Cook and I had lunch with Mr. Neinas around the time.

Q When you say "around the time," would that be around 1980? A It was that winter, late in 1980.

Q Mr. Neinas in the memo makes certain listing here of pertinent observations from the meeting and I would like to ask you about some of those. Take the first one, for example. It states, "College football [44] should sign a multi-network package."

Was that a statement or an opinion given by you or Mr. Cook? A Yes. I told Mr. Neinas that he was familiar with the fact that I proposed a multi-network package previously to the NCAA and I reiterated to him that I thought that it was in the best interests of the college football for the NCAA to have a multi-network package, whether CBS was one of the networks or not.

Q When had CBS proposed to NCAA previously to this that it go to a multi-network package? A 1977.

Q During the bidding time for that contract? A Yes.

* * *

[56] Q Would you look at paragraph 19, sir, which deals with major differences in ratings between college and professional football occurring earlier in the season.

Was that in fact true in 1980? A I believe if I could characterize what I think—

Q You can either give your opinion at the time, your own business judgment; if that's all you have, that's fine. A My judgment was, and I believe this is part of the conversation with Mr. Neinas, that one of the problems that college football on television had was that it was on a network which also had major league [57] baseball, and that the promotion which was given by the network, ABC, to major league baseball was subtracted from the prospective promotion they might have given to college football.

In that sense, the existence of baseball did hurt college football ratings on ABC.

There is a reference here to NBC baseball telecasts which I don't recall.

* * *

[58] Q Let me show you Exhibit 930, please, which I think is exactly on the topic you are discussing. It is dated April 16, 1980 and is a memorandum from you [59] to others and has attached to it an agenda for the College Football Association meeting that May and June, and ask if that is a memorandum that you wrote to the people indicated about your meeting with Mr. Neinas. A Yes.

Q Does that reflect what Mr. Neinas told you in terms of the four conclusions that are stated there in the middle of the letter, the first page? A Yes.

Q Did you advise Mr. Neinas at the April meeting that college football is a losing proposition financially? A As I say, I know I indicated that to him several times. I don't remember if at that meeting I did.

Q At that time in early 1980 was the college football programming popular with the affiliates? I take it that's the affiliate stations. A Yes.

Q Did you then believe that college football had not yet reached its potential? A Yes.

If I might clarify the answer I just gave you with regard to the affiliated stations?

Q Fine. [60] A I earlier testified that one of the problems we thought we had internally at CBS with the prospect of acquiring college football was the amount of time it would require, taken on Saturday afternoon, and that I did not think would be popular with affiliates.

We did know, however, that the acquisition of college football in general would be popular with our affiliates, particularly in the smaller markets.

Q Did you feel that college football had suffered because of ABC's long period of exclusivity? A Yes.

Q Did you have an understanding in 1980 that 70 percent of the sets in use watch pro football on Sunday? A To be exact about it, I believe that I indicated that when NBC and CBS were carrying competitive telecasts on Sunday afternoon at any given time as many as 70 percent of the sets on were tuned to professional football, yes.

Q You felt ratings would increase for college football if they went to two networks instead of one? A Yes.

Q To be specific, Mr. O'Malley, was it your view in 1980 that combined ratings for professional Sunday telecasts would be in the neighborhood of 30 when the [61] colleges were then receiving 11 rating points on Sunday afternoon? A Yes.

Q Excuse me, on Saturday afternoon. I misspoke. A Yes.

Q Did you know in 1980 that college football was receiving $31-million for an 11 rating and 23 exposures in 1980? A Yes.

Q And professional football would receive $140-million from three networks and 68 exposures for 1980? A Yes.

* * *

[77] *Examination by Mr. Vradenburg:*

Q Earlier in Mr. Coats' questions, Mr. O'Malley, he asked you a series of questions concerning CBS's planning or lack of planning in determining the per-game compensation for football games starting this fall. You referred to the fact that CBS had not yet commenced its planning in that regard in how to settle those prices. A That's true.

Q What did you mean by the word "settle" in that instance? A To establish our own guideline as to what [78] were appropriate rights fees to be offered to an institution for a national appearance, or for a regional appearance.

Q Do you contemplate that the actual game fee that will be set is going to be the product of discussion, negotiation, with individual institutions? A Absolutely. The fact that we have a fee in mind when we call them is not similar to other situations when we deal with sports, doesn't mean they are obligated to accept that fee. They undoubtedly want to negotiate that fee with us.

MR. COATS: Let the record reflect my objection to those two previous questions as being leading and suggestive.

Q Mr. Coats asked you a series of questions regarding whether CBS anticipated that the sum of game compensation

fees would equal, exceed or be lesser than the minimum aggregate compensation of the contract.

Do you recall that general line of questioning? A Yes.

Q Is it possible to determine now whether or not the sum of all of the game compensation fees is going to be lesser, equal to or greater than the minimum aggregate compensation set in that contract?

MR. COATS: Please note my same objection [79] to the form of the question.

A I think it is fair to say that it is our hope that the aggregate compensation won't exceed that number, but there is certainly no guarantee.

[478] **WILLIAM S. BANOWSKY**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Coats:

Q. Please state your name, sir. A. William S. Banowsky.

Q. Where do you reside? A. At 1200 South Pickard, Norman, Oklahoma.

Q. And what is your business or profession? A. I am president of the University of Oklahoma.

Q. Tell the Court, if you will, briefly, or give the Court a sketch of your educational and professional background. A. I was reared in Texas. My undergraduate work is from Tennessee. I have a master's degree from the University of New Mexico at Albuquerque, and a doctor's degree from the University of Southern California, Los Angeles.

My graduate work has been in the field of commu-

nications. I was, for ten years, president of Pepperdine University in [479] Los Angeles. For five years, early in my work, I served in the ministry, and now for four years I have been president of the University of Oklahoma.

Q. All right, sir.

Doctor Banowsky, I would also like for you, if you would, please, to sort of sketch maybe in slightly historical perspective how it happens that the University of Oklahoma finds itself involved in this litigation? A. I suppose it's been a natural outgrowth of concerns which have been sharpening at the university through the years. That is to say, I don't think there's any particular strategy or plan that we would be engaged in quite this serious a legal action, but we have had an escalating concern across a period of at least a half-dozen years, certainly before I came to the university, about what we felt were the unfair and somewhat coercive controls of the N.C.A.A.

I don't think anybody in Oklahoma fails to appreciate the value of the N.C.A.A. We regard it as a positive thing, generally; certainly as one of the major contributors to intercollegiates and American higher education. And we strongly favor our continuing role in the N.C.A.A., and the policing and regulating of the contests for rules and regulations that govern the recruiting and other codes of conduct.

What we have grown restive about is the controls and intervention and regulation of the N.C.A.A. into the commercial [480] and business activities of the University of Oklahoma.

We are not Harvard or Stanford, we live in a part of the country where our athletic program is one of our great traditions. We think excellence is contagious, and a recognition of quality in our sports events of all our teams is one of the assets we have in trying to compete, frankly, academically, against the institutions in the Ivy League or on the west coast.

And, therefore, to be in a controlled or regulated situation in which we feel our product, our ability to maximize the

advantages and opportunities of the institution, are being adversely affected, is the thing which we have regretted.

This is why the University of Oklahoma joined the College Football Association, not to leave the N.C.A.A., not really to be at war with the N.C.A.A., but to try to plead with the N.C.A.A. on matters of simple justice.

And, frankly, much progress toward greater justice has been achieved, which would not have been accomplished if those sixty-one institutions, including most of the major conferences in the country, had not had the nerve to challenge the almost dictatorial power of the N.C.A.A.

The C.F.A. organization has led to a restructuring within the N.C.A.A., which we would not have had, had we remained silent. This fall, for instance, the N.C.A.A. now will permit not one television broadcast on Saturday, but three. [481] There will be two networks, and then there will be a cable arrangement. And I don't think we would have had those advantages and others, if we hadn't—if we hadn't spoken out.

We felt that at issue were some legal questions, which perhaps ought to be aired in this kind of a court proceeding, as to whether or not the property of the University of Oklahoma, including its football programs and telecasting of those programs, belong to the people of the State of Oklahoma. I mean, the school is a public institution, and the taxpayers pay the bill—or whether or not we were simply signing that property over to an organization when we affiliated with that organization.

We maintain that's a precious property right. We think it's worth several million dollars a year to the University of Oklahoma, at a time of inflation and difficult budgets, when it's very difficult to field these athletic programs; that here is a product which the University of Oklahoma enjoys, which is being severely infringed upon and limited by unfair restraint of trade.

I suppose, Mr. Coats, it was because of that general concern which had developed through the years, that we felt that the only alternative would be for this to be given its day in court.

• • •

[486] Q. Doctor Banowsky, you observed both, I suppose, in Los Angeles and in Oklahoma, the interaction of universities, and I would ask you to comment to the Court on any competition or areas of competition which you have observed between universities. A. Well, universities don't compete in anything except faculty, students, money, and in those areas. I think competition is good. University of Oklahoma is competing in this state against Oklahoma State University, against other institutions.

The competition for faculty, for students, we are constantly recruiting in the state against one another, to generate better and better student pools. And I think competition among institutions, just like competition among individuals, it brings out the best in us, it hones our qualities.

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[488] *Cross Examination by Mr. Harry:*

Q. Good morning, Doctor Banowsky. A. Good morning, sir.

Q. Doctor, I think you stated that in your view, the television rights to the Oklahoma football program were worth several million dollars a year, is that correct? A. Well, let me say that that is—that is certainly not a sophisticated technical or financial analysis. It's [489] only my best judgment as a chief executive officer, that if our institution were, in fact, free to take our schedule of ten to twelve games, and then to negotiate with

all of the networks, with all of the cable people, with the satellite people, or whatever else, over the period of the seasons, that it does, in fact, cost us several million dollars.

Q. So that's just your own opinion based on your general knowledge? A. That's my own opinion, based upon my general assumption, rather than—I think "knowledge" might be too refined a way to put it.

* * *

[490] Q. Doctor, what is the annual cost for the latest period available of the Oklahoma football program, expense factor? A. Our total athletic budget is about ten million dollars a year, and I would have to refresh myself by looking at the budget to know how much of that is a football expense. Now, a sizable amount of it is, and virtually all the revenue side is football.

Q. Would someone else here, like Mr. Walker, perhaps, know more about that? A. Yes.

Q. So, I think you also said on your direct examination, Doctor Banowsky, that your concern is not only for Oklahoma, but to benefit all institutions in their athletic programs, as well. A. That's right. I mean—and I wish to make that point as clear as I can. I didn't attend a big state university, I attended a small, Christian institution in Tennessee, and a public institution in New Mexico, and then [491] a private university in California, for my own education. I have been the president of another private institution.

I think one of the reasons we are in the education business is because we would like to somehow give our lives to something that is a little less partisan, a little less sectarian, in something which sort of helps the whole cause. So I think it would be unfortunate for any of us to be arguing for a special private privilege, which, in fact, was detrimental to the total good.

I think, Mr. Counselor, that if we were free in the country, that what we would see is not simply Oklahoma and a few other schools being on all the time. In terms of a big, national picture, we would see a lot more regionalism. I think a lot of the schools in smaller states with less population, if they were free to do so, would be on television a great deal more than those regions and their people in Oklahoma, for instance, who can't get into your stadium because it's limited in Ardmore and Ada and Idabel and Muskogee, whom I believe would enjoy the University of Oklahoma football program a great deal more.

* * *

[494] Q. Now, Doctor, you are aware, are you not, of the fact that—and I think there's an exhibit in here, so I won't go in details, it's exhibit N-one—the Big Eight Conference rules provided for sharing of revenues among the members from college football television? A. Yes, sir.

Q. And that's on the basis that the team that plays gets an extra share, but other than that, it's divided equally among all members, isn't it? A. Yes, sir.

Q. Now, have you made a complaint about that rule? A. I would say that there is frequent discussion of that rule within the conference, and that the conference is a voluntary and free association. We have even had, sometimes, [495] informal discussions at the University of Oklahoma, whether we would be better off to be an independent institution such as Notre Dame or Penn State or others.

We have concluded decisively up to this point that the benefits of being in the academic community of sister institutions called the "Big Eight Conference" greatly outweighs whatever disadvantages we feel are attendant to our larger share, paying the larger share of the way.

But even this summer, there have been informal discussions within the conference of whether or not those arrangements should be altered, and they are altered from time to time.

Q. Has Oklahoma made any recent effort to change the revenue-sharing rules of the Big Eight? A. No, sir, but the University of Oklahoma and the University of Nebraska have been in informal conversation within recent weeks about what we should do when those things come up for official discussion again.

Q. Now, Doctor Banowsky, let me ask you: has there been a corresponding consideration by Oklahoma, similar to that about leaving the Big Eight, to leaving the N.C.A.A.? A. No, sir. And I would like to stress the word "informal." We have been a member of the Big Eight Conference for a long time, and we greatly appreciate that affiliation. All I am saying is that we feel that we are there on a voluntary basis, and if we choose this fall to leave the Big [496] Eight Conference, we would regret not having that kind of close fraternal association with the other seven schools.

But the University of Oklahoma and its athletic program could move forward in an unimpeding way; if we thought we would leave the N.C.A.A., we would be totally wiped out. It's not a voluntary association. We can't play football if we leave the N.C.A.A. We think the powers and controls of the N.C.A.A. are so pervasive and coercive that we would be unable to schedule in a meaningful way, we would be unable to conduct championships in any meaningful way.

So I think if we wished to, to construct an analogy between the N.C.A.A. and the Big Eight Conference, that the analogy does not work in favor of the N.C.A.A.

Q. Doctor, have you given any consideration at any time to Oklahoma withdrawing from N.C.A.A., not by itself, but in conjunction with a number of other members? A. I can tell you that we have never seriously considered withdrawing from N.C.A.A., and that that is not our desire now.

We regard the N.C.A.A. as one of the positive influences in the history of American higher education.

Q. So you do not know from having given it consideration, whether it is feasible for a group to withdraw from N.C.A.A. and have its own viable regulation program for sports? A. I do not know. I would judge that if a group of [497] enough institutions were to withdraw, that that group then could become some kind of a separate organization. But a single university which sought to withdraw, I think would be defeated.

* * *

[501] Q. Doctor, do you have any personal knowledge of any threats or coercion made by anyone connected with the N.C.A.A. against Oklahoma University? A. I would like to say two things here.

Q. Go right ahead, sir. A. In the first place, nobody has ever made any personal threat to me, nor in some formal or concise or clearcut way provided any form of intimidation.

However, as the president of a major university, there is very little that I fear more than our relationship with the N.C.A.A., for this reason: it's what a taxpayer fears in his relationship with the I.R.S. It's not that the taxpayer may be trying to do something dishonest, it is he fears a power which is pervasive and has such control over his life.

If I were to shoot the deal of the University of Oklahoma [502] on the campus this morning, it probably would not make *The New York Times*, but I wake up every morning knowing that anything in our athletic program might, because of the terrific powers of the N.C.A.A., be on the pages of *The Los Angeles Times* immediately.

Therefore, when we are going into this kind of battle, Mr. Counselor, I have been concerned that we might, at some point, face expulsion. There has been specific discussion among all of the presidents of the Big Eight as to whether we were wise or unwise to lead our institutions in a direction which might, in fact, end up in expulsion. Nothing could be more serious a threat, of course, than expulsion.

So it would be inaccurate to say that somebody had warned me we might be expelled, but in the performance of my duties, it did occur to me that we might be leading in that direction.

Also, I would be less than candid if I did not say that I have been concerned that subsequently, next year, the year after, the year after, when the smoke settles, the N.C.A.A. might wish to exercise unusually intense investigative procedures of those institutions which have had the nerve to challenge them in this public way. And in those cases we are at the mercy, of course, of that system, a policing system which I wish to say that I strongly favor. In the past decade the University of Oklahoma has benefited from those [503] regulations and has not had any serious—serious infractions brought to its attention.

I have not been personally threatened, but I have been living with the reality that this was very serious business, and having watched the way particularly in which the N.C.A.A. has exercised its ability to manage during these affairs, I have hoped that I would never live to regret the fact that we had tried to express our convictions in this highest possible arena.

* * *

[3] **(EXHIBIT YY-2)**

DEPOSITION OF DR. WILLIAM S. BANOWSKY, DEPOSED DECEMBER 21, 1981.

WILLIAM S. BANOWSKY,

a witness, being produced, sworn and examined on behalf of the defendant, deposeth and saith as follows:

Direct Examination by Mr. Harry:

Q. Would you please state your name, sir? A. William S Banowsky.

Q. And your address? A. 1200 South Pickard, Norman, Oklahoma.

Q. Your occupation? A. President of the University of Oklahoma.

* * *

[13] Q. Okay. Could we go now to the meeting of the chief executive officers, I believe it was the Big 8 that you did attend, sir, and I think that was on September 2 of 1981 and I believe was it was in Kansas City; is that correct? A. I did attend a meeting, I'm not certain of the date.

* * *

[15] Q. Okay. So Doctor Massengale then called a meeting as rotating chairman of the chief executive officers of the Big 8 universities? A. Yes, sir.

Q. And were all the eight chief executive officers present? A. Yes, sir.

[16] Q. And do you recall who else was there? A. I think that all or virtually all of the athletic directors and faculty representatives were there so that in effect it was a meeting of the three representatives of each of the eight schools.

Q. And were persons other than those from the Big 8 present? A. Not that I recall. Of course, Commissioner James and members of his staff were there.

Q. Yes, sir. And Walter Byers was there, was he not? A. Mr. Byers made an appearance in the meeting.

Q. In other words, the meeting began without him and then he appeared at request later on? A. Yes, sir.

* * *

[17] Q. All right. Was there explanation of why Mr. Byers was asked to be there and the reasons for his presentation? A. Yes. I think that he had been invited to express the point of view of the NCAA.

Q. And what did he say when he appeared? I don't mean to the exact words, but your best recollection of the gist. A. Excuse me.

(The witness and Mr. Coats exited the room.)

Q. (BY MR. HARRY) Mr. Banowsky, let the record show that you've had a brief conference with counsel and we will ask the reporter to read back the question.

[18] (The last question was read back by the reporter.)

A. My best recollection of the climate at that time was that we were on the eve of what might be regarded as one of the early deadlines of the NBC contract, maybe it was September 14 or 17. At any rate, that was one of the things which placed some urgency in the meeting in Kansas City. And my recollection is that Mr. Byers was trying to be reassuring along those lines that there was a letter from him or from the NCAA Council which had been circulated that might have alluded, and I'm certainly not sure of this, to potential questions of restructure of the NCAA and for a period of 15 or 20 minutes he spoke to the group in general terms about some of those things.

Q. Can you remember anything that he said? A. No, sir. I do not remember any—any specific deliniation of some issue that I felt was crucial to our concerns. I do recall a very clear sense of disappointment by a number of us that there had not been achieved quite as much of a spirit of compromise or reassurance as we had hoped for and this feeling of disappointment was clearly expressed by virtually all of us in the executive [19] session of chief executive officers which followed.

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[20] Q. Doctor Banowsky, can you now recollect anything specific that Mr. Byers said at the meeting of September 22? A. Nothing with such specificity that I wish to try to quote him at this time.

Q. I understand. What was it that he said that caused you a sense of disappointment? A. A general sense of confrontation. It was more a climate than anything that was specifically said. In fact, it may have been in part the absence of any specific reassurances, and I would say, just to be as clear as possible, that the subsequent events which culminated or which climaxed in the St. Louis Special Convention were entirely consistent with what I might have guessed would have occurred in my first encounter with Mr. Byers. I developed at that point a respect for his ability to operate a disciplined organization and I stood in awe of that discipline when I went to St. Louis.

Q. The first time you met Mr. Byers was I take it the September 2 occasion? A. Yes, sir.

Q. Now at the September 2 meeting did Mr. [21] Byers make any threats? A. No, sir.

Q. What was it that you expected from him that he did not produce at that meeting? A. There had been some speculation on the parts of one or two of the other presidents in our conference that the NCAA might have been coming forward with—I think more reassurances of substantial restructuring, and more reassurances that there would be—not that—it is not that there were specific threats made but reassurances that schools need have no fear of any kinds of threats.

• • •

[22] Q. Were you told that there would be a special meeting of the NCAA to deal with restructuring? A. No, sir.

Q. That was one of the reassurances you would like to have had but didn't get at that meeting right? A. Yes, sir.

Q. Was anything said by Mr. Byers about the NCAA proceeding through its Infractions Committee against anyone because of their activities through the CFA in regard to television of college football? A. Not that I recall.

* * *

[62] Q. Let's go to the No. 9 proposition, Doctor Banowsky at the Special Convention regarding property rights. One of the sponsors of that resolution No. 9 is the University of Oklahoma.

MR. COATS: Is that the right book?

MR. HARRY: I'm sorry, I'll hand it to you. In that I believe is the identical resolution. The property rights is No. 9 at the Special Convention, is identical to property rights No. 36 at the Annual Convention.

MR. COATS: Okay.

Q. (BY MR. HARRY) Did you participate in the preparation of that proposition or resolution? A. Not personally.

Q. But you were familiar with its text and studied it and approved it before it came up or before you attempted to have it brought up at the convention? [63] A. Generally so.

Q. Now, does it apply the the football television rights? A. It seems to.

Q. And it applies, I take it, to other property rights as well? A. It seems to.

Q. Would it permit the universities to determine the number of games they would play during the year? A. Presumably.

Q. And the use of their coaching staff in recruiting?

Would it help you to have this one (indicating)? A. Is it the same one?

Q. It's the same text but different proposition numbers for different conventions.

MR. COATS: All right, now, let's be excused just a minute.

(A brief recess was here taken.)

(The last question was read back by the reporter.)

A. I would like to correct my previous answer to say that I'm not sure that this proposal would [64] have any preference at all to the number of games we play. It certainly is not the attitude of the University of Oklahoma that this proposal addresses that kind of question. It is our thinking in being in favor of this proposal that it addresses specifically and exclusively the issue of the property rights of the University of Oklahoma regarding the telecasting or broadcasting of our athletic events. We favor the kinds of assistance that we receive from the NCAA on numbers of games which should be played and the size of coaching staffs and academic regulations and other rules and procedures that are required to conduct the very finest kind of intercollegiate contest. It is my strong personal conviction that the NCAA does and has done a superlative job in this field and it's awfully difficult to make that deliniation, but I can speak with a total conviction personally, and I think for the institution, when I say that we do not propose this property rights issue to try and be releived from those other legitimate controls and rules in which we believe the NCAA plays a very necessary and proper role.

Q. Thank you. Taking proposition No. 9 at the Special Convention, Doctor, is it your view [65] that it applies only to television of intercollegiate sports? A. No, sir. I think it should apply to other—to any issue that goes to the very essence of the property of the institution, such things as the size of our

stadium, what kind of a ticket price we may charge people who come to our stadium, the use of the logo of the institution; is that our right or is that a right that we deed over to some association which we may join, so it might be somewhat larger than the television issue per se, but it does not, in my view, extend over into that legitimate area where we feel the University of Oklahoma and all institutions need some kind of an association which can be certain that the rules are fairly arrived at and are fairly observed by all.

Q. Is it your view that the property rights resolution No. 9 at the Special Convention would eliminate, however, all NCAA controls on television of college football? A. Yes, sir.

* * *

[85] Q. Doctor Banowsky, are you aware of any [86] activity by CFA to establish an association comparable to NCAA? A. No, sir.

Q. You didn't know that Mr. Neinas had developed sort of an outline for such a program? A. The extent of my knowledge has been a very rudimentary paper that came to my desk that I assumed was mailed to all members of the CFA that suggested what some kind an alternative approach might be, but I have been in no discussion of any such thing and know nothing except for the appearance of that document.

Q. Has CFA authorized Mr. Nienas to develop an alternative organization to NCAA? A. Not to my knowledge. Again, CFA is administered primarily by its Board of Directors and I'm not a member of Board of Directors so I can't speak for the Board, but certainly not to my knowledge. And I would like to stress that it is the University of Oklahoma's desire and position to continue to be a member in good standing of NCAA. We have no wish to form any separate organization and are not seeking to be a party to any effort to form one.

Q. Okay. I take it, then, to your knowledge, [87] the University of Oklahoma has not made a study of the feasibility of such an alternative organization? A. I can speak conclusively that the University of Oklahoma has had no discussion whatsoever of any such option.

* * *

[3] **(EXHIBIT YY-3)**

DEPOSITION OF DANIEL G. GIBBENS, DEPOSED DECEMBER 21, 1981.

DANIEL G. GIBBENS,

a witness, being produced, sworn and examined on behalf of the defendant, deposeth and saith as follows:

Direct Examination by Mr. Harry:

Q. Would you please state your name, sir? A. Daniel G. Gibbens.

Q. And your address? A. Home address is 1306 Greenbriar Drive, Norman, Oklahoma.

Q. And your occupation, sir? A. I'm a law teacher.

Q. At the University of Oklahoma Law School? A. That's correct.

Q. And what do you teach? A. Constitutional Law and Criminal Procedure and some other courses that are related to those.

* * *

[6] Q. Now, what has been your experience or education or teaching, if any, in the antitrust field? A. Really none.

* * *

[11] Q. Well, what involvement did you have in the decision to commence the action? A. I guess the possibility of litigation came up in conversations and discussions sometime in late spring of this year or early summer, but it was only the possibility and at each point at that time frame, it was recognized by me and by the others in the conversation that we did not want to go to court unless we were put into a position where we felt like it was absolutely necessary. And that was my position up until a few days before the filing of this case.

Discussions became more intense following the Atlanta meeting of the CFA at which the NBC contract was approved, and during that period of time following the Atlanta meeting, the individual [12] CFA member schools had the opportunity of opting out of the NBC contract, and as we came closer to the cut-off date for that opportunity to opt out, it became apparent that the number of schools were really having difficulty with the prospect of NCAA sanctions and needed, as we perceived it, the protection of a court restraining order. And it was within a few days prior to the filing of the lawsuit that the CFA made the request of the Universities of Oklahoma and Georgia if they would be willing to be plaintiffs in the lawsuit, and we agreed, and I participated in those discussions.

Q. Now, you, in a sense, were involved to some degree at least with CFA, and of course I take it your basic position was that of a lawyer looking out for the interests of Oklahoma University, were they not at the time? A. I think more accurately, a faculty member with law training looking out for the athletic interests of the University of Oklahoma.

Q. That's what I meant to say. Thank you.

Now, from whom did this CFA request, concerning the institution of the lawsuit come? Who personally or individually did that? A. I think it came to me first and I am not [13] sure — I don't recall whether it was as a part of a conference call of some sort or whether it was in a telephone call with Chuck Neinas.

Q. And do you know how the University of Georgia happened to become a plaintiff? A. There were a number of telephone conversations at the time that the University of Oklahoma decided to become a plaintiff, and I was a party to a number of telephone conversations. I really do not recall what the communications were, between whom, whereby Georgia decided to come into the lawsuit. The University of Oklahoma at least initially did not wish to be alone in the lawsuit, and so there were conversations with other schools.

Q. Right. Professor Gibbens, did you participate in the action of the CFA leading up to the request to Oklahoma to be a plaintiff in this suit, or was that done by other CFA people so that you got word from the CFA to you? A. That was done by other CFA people.

• • •

[83] Q. Okay. Now, the judge kept asking this question so I guess I better ask you. You would know better than anybody. Why was the decision made not to have this lawsuit brought by CFA? A. The CFA, as an entity, did not have the interests at stake that the individual institutions had. And that sums up quite a few important considerations, but that was the specific concern.

• • •

Q. Is it not true that CFA requested Oklahoma to bring the lawsuit? A. CFA did request Oklahoma to bring the lawsuit along with others. There had been, I think, preceding that request, as I understood it, a number of conversations with respect to who would [84] be the most likely and best qualified plaintiffs. And part of the decision with respect to—and as related to me, as I recall, concerning the University of Oklahoma being a party plaintiff was that we were on line over the Labor Day weekend and, as I recall, it was over the Labor Day weekend we were on line to move and make decisions in ways that other universities apparently were not.

Q. But the request did come from CFA? A. That's correct.

Q. And from whom individually? A. I am not clear at this time on whether it was from Chuck Neinas or whether it was from a group of people as parties to a telephone conference call. I think it was probably Chuck Neinas, but I'm not sure at this time.

• • •

Q. Thank you. Did the CFA Board of Directors of which you were a member, I believe, approve the filing of this lawsuit? A. My understanding is that it was at the [85] request of the Board of Directors that the University of Oklahoma was asked to bring the lawsuit.

Q. And what— A. And therefore, to be very direct, it was my understanding that the CFA Board of Directors did approve it. Now this was prior to the time I joined the Board of Directors.

Q. That's right. When did you join the Board? I think you told me, but I forgot. A. We had a Big 8 meeting on or about October 1 and it was at that meeting that I was appointed.

Q. I see. Thank you. I take it then it was a decision of the Board of Directors of the CFA and not any decision which was approved or ratified by the members?

• • •

[89] Q. Let me ask you, did you attend both days of the Special Convention in St. Louis December 3 and 4, 1981? A. I did.

Q. And did you take any active participation or speak at the General Convention meeting? A. I did.

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[90] Q. Now, did you attend the CFA meeting that followed the Special Convention? [91] A. I did.

Q. And what occurred there? A. I think the opening of the—the session opened with a review by Chuck Neinas of the events of recent months. As I recall, next the members were asked if they wanted to discuss anything else. I think that it was Chancellor Young of LSU who spoke first and he addressed some wide-ranging concerns related to intercollegiate athletics. I think next President Banowsky spoke, emphasized the context in which Oklahoma sought to seek implementation of the NBC contract and then made the announcement that the University of Oklahoma would be committed to the NBC contract if it was joined by nine other institutions, including the University of Texas and one other sister institution from the Big 8 Conference. There was some—following that, Joe Paterno spoke generally in support of the NBC contract, in support of a variety of concerns related to intercollegiate athletics. The President of Clemson spoke at some length in a similar vein. There may have been several other short speeches made.

Q. Was it then known that the date for deciding whether to remain with the NBC contract on [92] the part of each member of CFA was to be December 14th? A. It was then known. That was a part of President Banowsky's statement.

Q. So that at that point each university was evaluating its position in the process of making its decision? A. That's correct.

Q. And did you have any participation, then, in dealing with the members as to how they should decide, whether to remain with the NBC contract or not? A. I had telephone conversations with each of my faculty representative colleagues in the Big 8 Conference. I spoke with the other seven individually on the telephone. I spoke with Mike Johnson who is the faculty representative at the University of Houston, and an acquaintance of longstanding. In all of these conversations, my primary goal was to make sure that it was understood what the position of the University of Oklahoma was that obviously we were in favor of the NBC contract. I was concerned to find

out if that position was well understood, and to make myself available for questions regarding our position or [93] the NBC contract.

In none of those conversations did I go into specific arguments or advocacy of specific aspects of the NBC contract. My assumption was that these people knew that at this time and I did not need to make any—that any additional urgings on my part would not seem appropriate to my colleagues.

I did get some few questions from a few of the people that I talked with, but nothing that was really memorable. As I recall, these were the only people that I talked with with respect to that decision and at that time.

We did have one or more CFA Board telephone conference calls during that period, in which we were discussing how things were going, and how to resolve the issue in light of various possibilities on the 14th. I suspect that I had some—I think that much is responsive to your question. I'll add this much. That I didn't have probably one to two telephone calls with Chuck Neinas individually to see what—to exchange ideas.

Q. And then did you learn shortly after December 14 that none of the other Big 8 schools [94] had held fast to the NBC contract? A. No. I understood that the decision was made to see if the contract could be effectively canceled before the final deadline for receiving position responses.

Q. And did that in fact happen? A. That's my understanding.

Q. So that NBC was advised even before the end of the day on the 14th that there would be no contract? A. If they were willing to have it canceled in that fashion, why, it was thought to be desirable as far as the CFA was concerned.

Q. And why was that desirable, Professor Gibbens? A. It appeared that regardless of which schools or how many schools

wished to stay with the contract, that it would not be a sufficient number to make it really a desirable contract.

Q. So it was an appraisal of the situation in anticipation of the result which you felt was better to initiate the decision rather than wait for it, so to speak? A. That's correct.

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[98] Q. To what extent is the CFA supporting this litigation financially? A. My understanding is that the CFA is supporting the entire cost of the litigation. Now, that doesn't mean that the University of Oklahoma doesn't understand that it's primarily responsible along with the University of Georgia.

[99] Q. As parties, but in the first instance, as a director of CFA, it's your understanding that the CFA will pay the entire expenses? A. That's my understanding.

Q. When was that arrangement made? A. It was communicated to me at the time that the University of Oklahoma was asked to be a plaintiff.

Q. Before you went on the Board? A. That's correct. It had been reaffirmed in subsequent Board telephone conference calls in one or more subsequent conference calls.

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[3] **(EXHIBIT 131-B)**

DEPOSITION OF THOMAS C. HANSEN, DEPOSED NOVEMBER 10, 1981.

THOMAS C. HANSEN,

a Witness, of lawful age, being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. Thomas C. Hansen.

Q. Where do you live, Mr. Hansen? A. In Prairie Village, Kansas.

Q. What is your home address? A. 8806 Rosewood Drive.

Q. And your age, Mr. Hansen? A. Forty-three.

Q. By whom are you employed? A. National College Athletic Association.

Q. How long have you been employed by the NCAA? A. Fourteen years.

Q. What is your current capacity with them? A. I'm Assistant Executive Director.

Q. Would it be fair to refer to you, at least staff-wise, as the number-two man? A. No. That is not accurate.

Q. All right. To whom do you answer? A. Mr. Byers, Executive Director.

Q. It's not accurate because there is another number-two man, [4] or there is no number-two man? A. Well, there are five department heads, I believe, and none of us is senior to the others.

Q. All right. You are head of one of the five departments, then, that the head of each of which answers directly to Mr. Byers, is that right? A. Yes.

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[7] Q. What are your responsibilities presently with respect to the formulation, negotiation or execution of the Football Television Plan? A. I am the Program Director for the Football Television Committee.

Q. What are your responsibilities as Program Director? A. To provide administrative support for the Committee.

Q. All right. Is that it? A. Yes, sir.

Q. How many employees assist you more or less directly in that responsibility? A. Just one.

Q. Who is that? A. James Shaffer.

Q. What are his responsibilities? A. He assists me in taking minutes of the meetings, and he has [8] also this year administered the Exception Telecast Program.

Q. That is a responsibility which you have been in charge of until this time? A. Yes, the exception telecasting, that is correct.

Q. Then, you are the employee of the NCAA that has the regular and direct contact with the Television Committee? A. The Football Television Committee, yes.

Q. Excuse me. Football Television Committee. That Committee was made a separate committee as effective what date? A. I believe it's the end of the convention because we appointed a General Television Committee, and I don't have a precise date for you, but it must have been effective with the end of the convention.

Q. 1981 convention? A. Yes, sir.

Q. Who is the administrative liaison with the General Television Committee? A. I am on that one.

Q. That is your responsibility also? A. Yes.

Q. What television events does the General Television Committee have responsibility for? A. It's to assume control of all events other than football. All activities other than football.

Q. Well, what activities other than football is the NCAA [9] associated with the television of? A. The respective NCAA championships.

Q. Is that it? A. Yes. That is the only activity in which it's engaged.

* * *

[51] Q. Were you aware that the NCAA Council was having a meeting in the middle of August, second week of August, in Gleneden Beach, Oregon? A. Yes, sir.

Q. Were you present at that meeting? A. Yes, sir.

Q. Did the topic of whether or not the CFA members who entered into a contract for televising their games over NBC might be in violation of some provisions of the NCAA constitution or bylaws was discussed? A. Would you ask me the question again? I'm sorry. You asked it wrong.

Q. Do you recall whether they talked about CFA members would be in violation of the constitution or bylaws if they entered into a contract with NBC? Was that discussed? A. That topic was discussed.

Q. Over how long a period of time do you recall that was discussed? A. No, sir, I don't recall the duration of the discussion.

Q. Well, I mean, they met for a full week, didn't they? A. No, sir.

Q. How long did they meet? A. I believe the Council met for three days.

Q. Did they discuss it on more than one day? A. I don't recall.

[52] Q. Are you prepared to say the discussion involved more than a passing reference to the question? A. No.

[There was substantial discussion.]

Q. You can't say that? A. No, sir.

[There was substantial discussion.]

Q. Did you have occasion to talk to the press about that question about that period of time? A. Yes, sir.

Q. Whom do you recall discussing that with, members of the press? A. To my recollection, Jerry McConnell.

Q. Who is Jerry McConnell? A. He is a writer with one of the Oklahoma City papers, I believe.

Q. Did you have an occasion to see his writing up of his discussions with you? A. I don't recall having seen it, no sir.

(Off the record.)

Q. (By Mr. Muchmore) Mr. Hansen, would you refer to Exhibit 9 from the preliminary injunction hearing, a newspaper article, August 15, 1981, "Oklahoma City Times". Take a moment and read that yourself, if you would. A. Okay. I've skimmed over it.

Q. All right. The first three paragraphs purport to tell what the NCAA Council did at the meeting you have just testified [53] about. Is the information in those paragraphs generally accurate as to what the Council did—well, strike the words is that accurate as to what happened. Omit the second paragraph, which is not about the Council.

MR. HARRY: Just the first and third?

MR. MUCHMORE: Yes.

THE WITNESS: Well, I can't really speak to the fourth.

MR. HARRY: He is just asking you about the first and third.

THE WITNESS: I would disagree with any—I believe that the first and the third are generally accurate. I don't know that there is a recommendation, but there obviously was some communication. That is where I am having a problem. I don't know that there would be a recommendation from the attorneys to the Council but—

(By Mr. Muchmore) "Recommendation" may be too strong a word as to whether, in fact, the administration and attorney makes recommendations as to actions? A. Yes.

Q. But other than that, those paragraphs are generally correct? A. Generally, yes, sir.

Q. And the next paragraph appears to be a quote attributed to you. I can't ask you word for word, right, but is that [54] basically what you told Mr. McConnell? A. I believe that is in general the statement that I made, yes, sir.

Q. And the next paragraph, that the Council also instructed that the infraction proceedings should be handled "expeditiously", is that correct? A. I believe that I used the word "expeditiously" with Mr. McConnell. I don't think that is the word the Council used, but that can be checked.

Q. That was your word to describe what the Council generally did whether or not they used that word? A. Yes, sir.

* * *

[55] Q. The NCAA contends that a tie-up between NBC and CFA would be a violation of its own Plan—that means the NCAA Plan, I guess—and thus make the CFA schools involved subject to penalties. Do you agree with that statement? A. I can't find it. I'm sorry.

Q. Bottom of the fourth column. A. Oh? I don't agree with the portion of the statement that contends NBC and CFA would be in violation.

Q. The distinction you are making there is that CFA could tie up with whomever they want, it's the individual school that violates by its acts, is that correct? A. That would be my interpretation. CFA could do whatever it [56] wants in terms of a contract.

Q. "The NCAA has never said what the possible penalties may be but Hansen said earlier the schools could be placed on probation and barred from appearing on television or participating in other NCAA events, such as the NCAA basketball tournament." Is that right? A. I don't recall ever specifying basketball tournament. I have on occasion, in response to media questions, responded as to what penalties are available to the Committee on infractions, which are all printed out in the manual.

Q. One of those you may have said would be they could be placed on probation, is that right? A. Yes. That is a penalty.

Q. And that would bar them from appearing on television or participating in other NCAA events, would it not? A. No, sir, it would not.

Q. Would it be a penalty available to the Infractions Committee that they could be barred from appearing on television with respect to football? A. Yes, sir, that is correct.

Q. Would it be a penalty available to the Infractions Committee that they be barred from participating in other NCAA events—and I take it that means championship events? A. Yes, sir.

Q. And that would include basketball, would it not? [57] A. Yes, sir.

Q. And wrestling? A. Yes, sir.

Q. Swimming and diving? A. Yes, sir.

Q. All the other championships? A. It could.

Q. And this could be for violation relating to football television only, is that correct? A. Insofar as the Committee has those available to it, it could be.

Q. Yes, sir. That is what we're talking about. You are quoted as saying in this case, "I wouldn't think it would take a good deal of work to discover whether or not they had violated our rule." Is that an accurate quote? A. Generally.

Q. And by "accurate", I guess I mean two things. Is that essentially what you said? A. Oh, I'm sorry. I didn't know you paused. Yes, I think that is generally what I said.

Q. And second is, is that correct? A. Well, to the best of my understanding of how the rules would be applied, yes. Or I really should say enforcement proceeding and not the rules.

Q. What do you mean when you say "they had violated our rule"? [58] What rule are you referring to? A. The Television Plan of the NCAA.

Q. Do you consider that a rule of the NCAA? A. Yes, sir.

Q. You appeared at the CFA membership meeting on August 21, 1981, also, did you not? A. Yes, sir.

Q. You and Mr. Hallock both appeared? A. That is correct.

Q. Did you discuss at that time whether members would be in violation of any of the rules of the NCAA if they proceeded to have their games televised under the CFA-NBC television contract? A. I believe I was asked the question about that.

Q. And you responded to it? A. Yes, I did.

Q. Were you asked specifically the question, "Well, okay, at what point are we in violation, when the CFA enters the contract, when we don't opt out, when we actually appear on TV?"—the question generally along that line. Give your opinion as to what point they would be deemed in violation. A. I believe that that was the general question. I don't believe they were asking for my opinion. I believe they were asking for what the Council had said.

Q. Well, okay. I appreciate that distinction. What response [59] did you make? A. I can't recall my specific response.

Q. Would you have told them that if a member commits to another television program outside the NCAA program, then, it's in violation of the rules? A. I don't recall how I responded.

Q. Is that consistent with what your understanding at that time was? A. Could you read it again, please?

Q. But, essentially, what the Council has said is that if a member commits to another television program outside the NCAA program, then, it is in violation of Constitution 4-2-(a), The Conditions and Obligations of Membership, which states specifically that the member agrees to abide by the NCAA rules and regulations, and agreement not to abide, therefore, places the member in violation and subjects it to the Enforcement Program.

MR. HARRY: May I see that a minute?

MR. MUCHMORE: No. This is nothing that has been produced at this point, Mr. Harry.

MR. HARRY: In other words, that is one of your own papers?

MR. MUCHMORE: That is right.

MR. HARRY: So, you can't see it, and if you can remember what he asked you, you can answer it.

[60] THE WITNESS: I don't know.

Q. (By Mr. Muchmore) I'm not asking you word for word. I'm asking you if that generally fits with your recollection of what you would have told the CFA special meeting. A. Well, I have answered I can't remember what I told the CFA meeting.

Q. You can't say one way or the other? A. No, sir.

Q. Was what I read you consistent with your understanding at the time? A. Understanding of what, precisely?

Q. Of what the Council had said? A. Yes. That is my understanding of generally what the Council's position was—policy was.

Q. And was it your understanding that the violation would not begin on a vote but at the time that the CFA submitted to NBC a list of participants in the CFA program, was that also

part of your understanding? A. I think it went beyond that. I think, actually, there had to be an agreement consummated to which they had committed.

(Off the record.)

Q. (By Mr. Muchmore) You were aware that a transcript was being made, or recording was being made, of what was taking place at that time, were you not? A. Yes, sir.

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[68] Q. Go ahead and look at what has been marked as Exhibit Number 2. That is an interview that you granted to a newspaper in—it appears to be Jackson, as best I can tell. Is that Jackson, Mississippi? A. It appears to be. As you say, it's very difficult to tell because the name has been cut off.

MR. MUCHMORE: Let the record show it has a zip code, 3-9 something, if that is Mississippi.

Q. (By Mr. Muchmore) They play football down in Jackson, don't they? A. Yes, sir, I think they do.

Q. It appears to be an interview with you. You can read as much of it as you wish. My questions are going to be directed toward the last three questions there, but you can review as much or as little of it as you wish. Does what appears to be an interview with you there, to the best of your knowledge, is that an accurate representation of what you told the reporter at that time? A. Well, it's at best a summary of the conversation which I obviously had with the writer.

Q. Is there anything in there you would take issue with whether you said it or even whether you meant to say it that way? [69] A. Are you now addressing the last three questions?

Q. First, I am addressing the last three questions. A. I would say that there is one particular inaccuracy, mine and not the writer's, undoubtedly. It says there is several occasions when a school has been instructed not to conduct the program

for a year or two. I believe that has been the situation twice, and I say "several". But, other than that, in general, that is acceptable.

Q. If "several" means two or more, then that is— A. If it means two period, I believe it's accurate.

Q. Is there anything you would take particular exception to in the rest of it? A. This is generally acceptable as a summary of our conversation. I think it's narrow, but that is all right.

Q. Limited space, right? A. Yes, sir.

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[82] Q. Mr. Hansen, under the Football Television Plan of the NCAA [83] in past years, and I assume in future years, although I haven't seen it, an individual institution, insofar as the contract is concerned, enters into its own contract to televise its own home games with the network, is that right? A. Yes, sir.

Q. It has been true in the past and will be true in the Plan which has recently been negotiated that those contracts must be for a certain minimum amount? A. No, sir.

Q. All right. Would you clarify that, please? A. The network—the institution, rather, is free to negotiate with the network for a price satisfactory to it. By that, I mean the home institution.

Q. It can be either higher or lower than the specified amount? A. There is no amount specified.

Q. No amount specified? A. No, sir.

Q. Well, how are the amounts generally determined, arm's length negotiation between the school and the network? A. Well, the network has the authority to pay as it sees fit, and I am not a party to the negotiations, so I can't answer more than that.

Q. You don't know whether—you don't know how the price is normally arrived at? A. No, I don't.

[84] Q. For all you know, ABC calls Wade Walker and makes him an offer, he makes a counter offer, and they haggle over it for a few days and come down to a price? A. For all I know, that can be done, yes, sir.

Q. Do you know that that was ever done in the history of the NCAA television? A. Yes, sir. We have had a number of times where the network has changed the pricing within a season or for a season, and we have had discussions—I am aware of discussions where a network was asked about a different price and agreed to discuss a different price.

Q. Now, let me break that down. The first thing you talked about, the network changing the pricing. You are talking about a general change applicable to all games, are you not? A. I am talking about the network change so it has different amounts of money to award to games that it was going to televise.

Q. You are not talking about making a change for an individual game; you are talking about making a prospective change for the remaining games, are you not? A. Well, the network's policy has been to generally have the same price for respective types of games, but it has reached a point at which it wishes to change the program that it's going to televise and receive authorization to change from the Committee and has done different numbers [85] of regional or national and thereby changed the pricing for specific games as well as their other games they are televising.

Q. Changed the price for one specific game? A. On occasion, yes, sir.

Q. When has that been done? A. Well, it is in the records. I can't tell you the year.

Q. What is the last time you remember that happened? A. Oh, it's within the last six or seven years.

Q. Now, tell me when a school ever asked for and received a greater amount than would follow under the network pricing formula. A. I was told by Jim Spence, Senior Vice President for ABC, about three years ago the Commissioner of the Big Eight Conference asked him if he would negotiate a separate price for a game of institutions in that Conference, and he told him, yes, he would.

Q. And what came of that? A. Nothing because the next question was, can we negotiate the other games, and the Commissioner declined to negotiate the other games.

Q. What other games? A. Other games being televised by ABC in that Conference.

Q. The Commissioner wanted to raise the price on several desirable games, and ABC said, sure, if we can talk about [86] lowering the price on the others? A. Essentially.

Q. And that essentially ended the conversation? A. I don't know that.

Q. But as far as what you heard? A. As far as I know, they essentially did not change prices.

Q. All right. So, my question, then, again is, do you know of an occasion when a given institution or a group of institutions asked for and received a price different from the network pricing formula? A. No, I don't.

Q. Now, is that network pricing formula, that is a negotiated matter between the NCAA and the network, isn't it?

MR. HARRY: Object to the form of the question. I don't know what the reference to formula is.

Q. (By Mr. Muchmore) Well, there is some sort of formula, is there not, that is applied week to week that determines how much is paid for a given regional game? A. No, sir, not to my knowledge.

Q. You don't have any idea how those amounts are computed? A. Well, the network does the computations. The

network pays the price, but you asked about a formula. I don't know of any formula.

Q. You don't know how the network arrives at their prices? A. Well, they obviously take the minimum aggregate and pay it [87] out as they desire over the total games that are televised.

Q. Whether they use any arithmetic means to determine how much is paid for one regional and/or another regional, you have no idea? A. No, I don't know what their considerations are.

Q. And they do that without the consultation with or approval of the NCAA? A. Certainly without the approval. They have talked to us in the past about the amounts.

Q. They do not ask for your approval on that? A. No, sir.

Q. And as far as you are concerned, they have the right unilaterally to arrange the compensation however they want as long as the individual institutions whose games are being televised go along with it? A. Yes, sir.

Q. And NCAA has no say in that, either legally or as a practical matter? A. That is my understanding, yes, sir.

Q. Well, I want to know what your practice has been. As a practical matter, the NCAA has had no say, formally or informally, in how ABC divides up this money between the various regional games? A. I told you that in the past we have discussed that with them and we have not done so recently, and so I hope I'm [88] responsive to your question. As I said, they have the total right to set the price and do so.

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[120] MR. MUCHMORE: Would you mark that, please.

(Whereupon a certain document was marked by the reporter for identification as Plaintiffs' Exhibit [121] No. 13. R.B., 11-11-81.)

Q. (By Mr. Muchmore) Would you look at Exhibit 13, please? A. (Witness responds.)

Q. Have you had an opportunity to look at Exhibit Number 13? A. Yes, sir.

Q. Is that a memorandum that you sent Mr. Byers on January 23, 1976? A. Yes, sir, it appears to be.

Q. And would you read the third paragraph of that memo, please aloud in the record? A. "First, in an action that does not require approval, but is merely reported, the Committee set the 1976 dash 1977 rights fee at $501,538.00 for a national game and $380,000.00 for a regional game."

Q. And I will ask you if it is not true that for the next year, the national games payment made was totally for each of them, $501,538.00? A. To the best of my recollection, it was.

Q. And was the fee for a regional game for the next year exactly $380,000.00? A. I don't recall that. I'm sure it's in the records and can be checked.

Q. You don't have any reason to think it was not $380,000.00, do you, that it was changed from this? A. It doesn't strike me as a number I remember, but, of course, [122] it's been a long time, so I'm not challenging it. I'm just saying I don't remember that one.

Q. Do you have any recollection of it being changed after it was set by the Committee meeting in January? A. As I have said to you, there were a couple of years where the numbers were changed even after ABC had set them, and so I don't—that is where I'm saying to you I don't remember that number.

Q. In your report here, you say, "The Committee set", do you not? A. Yes, sir.

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[505] **JOHN R. MOHR**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please? A. John R. Mohr.

Q. And would spell the last name? A. M-o-h-r.

Q. Where do you live, Mr. Mohr? A. I reside at 13840 Valley Vista Boulevard, Sherman Oaks, California.

Q. And what is your current employment? A. Currently, I am vice-president of sports programming for Los Angeles, for national subscription television, which is over-the-air, pay-subscription television service.

Q. What is the name of that service? A. Marketing name we are more widely known by is "On T.V."

Q. That's "On T.V."? A. Yes. O-n T.V.

[506] Q. Would you generally explain what a subscription T.V. service, how it's different from cable, how it's different from free T.V.? A. Okay. First and foremost, we are what they call a "premium" or pay service; there is no commercials, there is no commercial interruption, there is no editing of our product. We offer to our subscribers for a fee of twenty-two dollars a month, current motion pictures, unedited, uncensored, without commercial interruption, as well as live home sporting events which are a major part of our programming.

We differ from cable in that subscription television, by definition, technologically is an over-the-air-transmitted scrambled signal, rather than cable, which is delivered literally by a cable.

* * *

[507] Q. What cities do you operate in, in that manner, besides Los Angeles? A. Besides Los Angeles, we have On T.V. systems that we operate in Miami, Fort Lauderdale, Dallas-Fort Worth, Chicago, and Phoenix. We have an affiliate system in Portland, affiliate being we sell them or franchise them the right to use our name, and we provide them the programming package.

Additionally, there are other On systems. Detroit and Cincinnati, which are either owned by other individuals or where we have again franchised the name.

We will be opening additionally, I would say, in the next year, we plan to open in Baltimore and Houston.

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[509] Q. Would you tell the Court what sporting teams you do have on T.V. there, on On T.V. in Los Angeles? Just a list of them. A. On T.V., we currently have agreements with Los Angeles Dodgers —

Q. That's professional baseball? A. Professional baseball. California Angels, professional baseball team, I might add. World champion Lakers, professional basketball team. The Los Angeles Kings, professional hockey team. The Santa Anita Parkway, which is a racetrack in Santa Anita, I should say Arcadia, University of Southern California, and the University of California at Los Angeles.

Q. As to what sports do you have an agreement with, University of Southern California and U.C.L.A.? A. With the University of Southern California, we have the exclusive pay television rights for the Los Angeles market to all sports that fall under the athletic program, [510] with the stipulation, I — it would include football. There is a prenegotiated rights fee with the University of Southern California for football telecast. However, the rights are subject to N.C.A.A.-two approval, because of current restrictions on the contract.

Q. More about that later. What about U.C.L.A.? A. The University of California, Los Angeles, we have specifically television rights to basketball games, predetermined amount of basketball games, as well as football and other sports events. We have a first right of refusal on a first right of negotiation, if you will. We didn't get too involved in the football negotiations specifically because of the fact that it is very difficult to clear an exception telecast, and if we were able to clear one, then we would deal with those games on an individual basis. But we do have a first right of refusal.

* * *

[512] Q. I should have asked, during the day until seven o'clock p.m., the station broadcasts like any other free television station? A. That's correct.

Q. And it's a U.H.F. channel, did you say? A. Channel Fifty-two.

Q. With respect to the televising of the events of the University of Southern California and University of California at Los Angeles, and specifically first relating to football, what has your experience been as to the number of University of Southern California games that you have been able to televise in the five years that you have been there? A. In the five years that I have been with On T.V., [513] we have had — actually, the U.S.C. agreement has been in effect for the past three seasons. During those years we have been able to televise under the exception telecast, I believe it's four games.

Generally, every year I take the U.S.C. and the U.C.L.A. football schedule and analyze it within the requirements of the exception telecast, and then I sit down with the universities and we prepare necessary documents to request an exception telecast.

Q. Well, let me ask you, if it were not for the exception telecast policy that you referred to, and about which there has

been testimony in the case, what would your desire be insofar as televising of U.S.C. football games? A. As far as U.S.C. football, we would like to televise every game, home and away. The nature of our business, television programming, is highly competitive, and one of the reasons that we believe we have been so successful, not only in Los Angeles, but in the fact that we are the largest single system, is our sports program.

* * *

[517] Q. Would you explain to the Court your basis for your statement that the demographics are different on college football? A. This comes again from our Neilson ratings. Our Nielson ratings not only break down — they break down the amount of our subscribers watching, and they break it down by age and sex, demographically. And we have found that college sports — in fact, let me say this: all sports, first and foremost, all our sports rate extremely high. They rate very high in the area of men twenty-five to forty-nine, which is critical to us, because generally, that's the decision-maker in our marketing strategy as to whether to buy On T.V. [518] College sports rate a little differently. The percentage of viewers that watch is still very high, but we also pick up a demographically different audience, different mix. We pick up women, and we pick up teen-agers. We believe that college sports are very different than professional sports, in that there is a different base of sport, alumns, students. There's more pageantry, more color. We found this at this point in basketball, and with a little experience in football.

* * *

[535] Q. Mr. Mohr, do you have an opinion, generally, as to all the sports that you deal with, as to what the effect of television exposure is on attendance over a period of years? A. I have experience. I have an opinion, and so do the teams: no impact. In fact, in the last five years the Los Angeles Dodgers, the

California Angels, have increased in attendance every year, and we continue to do a reasonable amount of home games.

You know, most of the teams—and as I say, I deal with this on an—on a recurring basis, they feel that the television exposure and the television promotion, the ancillary benefits of that more than helps them, if not on the game that we are doing, on the rest of their games.

Television is the most powerful means of selling your [536] product, whether it be an advertising product, or—or a piece of programming. And in the case of all of our teams, including the schools, they feel that the marketing exposure that they get from On T.V. is paramount in helping them sell tickets to additional games.

In the case of the schools, they feel it helps recruiting. They feel it helps the stature of not only the athletic program, but consequently, the image and stature of the university within the market, which they feel also helps them in getting quality professors.

Q. Mr. Mohr, there has been some concern expressed that if television of college football were unregulated, that the super-popular national game might drive contests of lesser national importance off the television screen.

From your familiarity with the markets in Miami, Dallas, Chicago, Phoenix, Los Angeles, and these other cities, what is your opinion as to what the interest would be if college football television were not regulated as to the type of games, the interest would be in those cities? A. My belief is if the schools control their own destiny in and beyond the three network telecasts, whatever it happens to be, that they are very capable of it. I believe that—I don't believe that college football will be impacted at all.

I feel that as college football is exposed on a live [537] basis — and generally, as I said earlier, would be done prominently in local markets.

Q. That's what I wanted to know; what kinds of games you would be interested in in those markets? A. I think one of the concerns, the primary demand will be local and regional telecasts. I don't really see a situation in Los Angeles where you have got, you know, fifteen or sixteen games coming in crossing the river.

First of all, there isn't enough distribution. If U. S. C. is going to be on live, and U. C. L. A. is going to be on live, and possibly Long Beach State, there is only so many stations available. And I am not convinced that from a commerical television standpoint, that they are going to be looking at television stations at additional network games.

The primary thrust will be the exposure and marketability of the local and regional telecasts.

Q. Then I want to know whether you think there will still be a demand for a local game, if there is a glamorous game available? A. Higher demand.

Q. Pardon me? A. A higher demand. We have found that in the exception telecasts that we have done in the four or five games — and I am not sure, either four or five — we have done games when the network game not only was head-to-head, sometimes, [538] you know, we may be on, as an example, from eleven to two a.m., and the network game may come in from ten thirty to one.

More often when we do an exception telecast, we are competing with the network game, and our ratings to our subscribers are consistent, whether we are head-to-head with a network.

* * *

Cross Examination by Mr. Harry:

[545] Q. Now, would you detail for the Court your testimony that programming is highly competitive, Mr. Mohr? And by that, I mean to direct your attention to the kind of program-

ming that competes for air time. A. Okay. My statement about — I can cover that. When I say "highly competitive," I mean — what I meant by [546] that was in acquiring rights.

It's also, of course, highly competitive in the choices that a subscriber or viewer has. The key to television, basically, is programming. Subscribers and viewers watch programming, they don't watch stations. When I go and try to acquire a Dodger game, I am competing not only with other pay systems or cable systems, but once I make the acquisition of the product, from a programming standpoint we are competing with seven other stations in the market, commercial television stations, to say nothing of the other satellite-fed cable networks.

Q. And is there an abundance of sports programs in the Los Angeles market for showing on T.V.? A. There's an abundance of nonlocal, live. If you are talking football.

• • •

[547] Q. Now, you said that you had balanced programming, and I want to pass that, and that you used in your programming a little bit of a lot of things. I would like to explore that.

Does that mean that you intersperse other kinds of programs with your sports, that — either movies or specials, and things of that kind? A. Yes, that's correct. The balance — we have balanced programming in two areas. One in our overall programming; it's movies, specials, and sports, which — local sports, which are balanced.

And I also meant — I used the word "balance," as it relates to my area, sports programming. We try not to emphasize too heavily, because we are a prime-time service, and because we are a one-channel service. And if we put on too many baseball games, for the nonbaseball fans we are [548] taking away movies. So we look at an overall balance and mix of our sports programming, as well.

• • •

[550] Q. (Mr. Harry, continuing.) The testimony that I wanted to turn your attention to concerns your opinion on the effect of television on the game attendance, if you recall that general area? A. Yes, sir.

Q. Now, were you primarily testifying in those questions — in that area; that pay T.V. did not affect the game attendance? A. Yes, sir. I think commercial T.V., I don't know —

* * *

[557] **IRA HORROWITZ**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. State your name, please? A. Ira Horrowitz.

Q. Where do you live, Doctor Horrowitz? A. 2815 Northwest Twenty-first Avenue, Gainesville, Florida.

Q. What is your profession? A. I'm an economist and professor in the graduate research currently at the University of Florida.

Q. What is your educational background in that area? A. I hold a bachelor's degree in economics from the John Hopkins University. I received that in 1955. I received a PhD in industrial economics from Massachusetts Institute of Technology, in industrial economics, in 1959.

Q. What previous academic positions have you held? A. Well, after receiving the PhD in 1959, I spent a year with Midwest Research Institute as an operations research analyst, and then I took my first permanent full-time academic position at Indiana University in 1960, as an assistant professor of quantitative methods, and I remained at Indiana University until 1972.

[558] I went from assistant professor, to associate professor, to full professor. I had a one-year leave for research appointment at the Catholic University of Louvain, in Belgium. And then in 1972, I left that university to become chairman of the planning department at the University of Florida, and I —at the University of Florida, since I remained as chairman for six years, and I had a one-year leave in 1975-1976, when I was employed as senior economist at the economic policy office of the antitrust division of the Department of Justice.

After I resigned as chairman of my department in 1978, I spent one year at the School of Business at Michigan State University, and then I returned to the University of Florida as graduate research professor in 1979.

Q. Are you involved with any regular publications? A. Well, in addition to being an author, I am the editor of a journal, *Decision Scientist.* I have been the editor for five years, it's my second of two three-year appointments, I finish up next year. I'm also on the — I have been on the editorial board, that term is now ended, *The Academy of Management Journal,* and for some time I have been on the editorial position of *The Journal of Industrial Economics* and *The Journal of Business and Economics.*

Q. What about individual publications? A. My publications, I published, authored, or co-authored three books on one monograph, and perhaps something in that [559] neighborhood of seventy articles.

Q. And these are all related in one way or the other to the general area of economics? A. Yes.

Q. Do you have any particular areas within the field of economics that you have specialized in or devoted more time in than others? A. Well, with the field of economics, as we construe it, is broad enough to include business — well, within that area, my teaching for the last several years has been in the area of what we call quantitative methods in business, on management sciences, and that requires me to teach in the

areas of statistical decision theories, mathematical programming, which are a variety of quantitative methods that we use to help solve business and economic problems. My major —

Q. Those are all part of management science? A. Yes, they would all be part of management science or quantitative management science.

Q. And explain what management science is. A. Management science is the scientific approach to the management processes, as opposed to viewing management as an art, as well as traditional, in the area, so you — sophisticated quantitative techniques, for example, to help us solve various management problems.

Q. All right, sir. Do you have any other areas of [560] specialization? A. Yes, my major research interest within the last, I suppose, decade, if not longer, has been in the area of industrial organization and industrial economics. And in particular, in recent years, I have been principally concerned with the problems of self-regulation in the professions, potential competition both in economics and as it relates to antitrust issues, and problems with market — issues of market definition and decision-making in antitrust, in general.

Q. Would you clarify what areas of economics as relate to antitrust problems that you have devoted time to that you have specialized in? A. Specifically, as — the area of potential competition.

Q. Potential competition? A. Yes, sir.

Q. What else? A. Market definition, and over the course of the last twelve years, I have spent a lot of time studying the issue of sports broadcasting, as a problem which the government and—has shown some interest.

Q. What do you mean by "sports broadcasting"? A. Well, specifically, the telecasting of professional and collegiate sports and the economic issues related thereto.

Q. Has that been in an antitrust context, at least in part? [561] A. At least in part, yes.

Q. Specifically, what experience have you had in that area as far as dealing with the specific lawsuits or with the government? A. Well, with specific respect to sports broadcasting, I was employed as an economist in two different antitrust actions, and at the time that I was with the economic policy office at the antitrust division —

Q. Of? A. — of the Department of Justice, U.S. Department of Justice, there were — I can't recall, one or two instances, perhaps more, when issues were raised about the possibility of bringing antitrust suits in the area and I was brought in to consult in those days.

Q. Have you testified before Congress on any of these matters? A. Yes, in terms of the professional — in terms of sports broadcasting, I testified before both houses of Congress and I have been invited to and submitted statements, I think, to both houses of Congress, when various sports bills were considered.

Q. And in the antitrust area, generally, what experience have you had in your dealings with the government? A. In the antitrust area, in general, I indicated that I was employed with the antitrust division with the U.S. [562] Department of Justice for about fifteen months. I also was subsequently a consultant on a project or two. For the last several years, I have worked on—that is, perhaps the last three or four years, I have worked on several different cases for the Federal Trade Commission. I have also been profitably employed in antitrust suits, various antitrust cases, by numerous law firms, as well as for a couple of years by A.T.&T., in connection with the A.T.&T. case.

* * *

[566] Q. Would you explain, please, for the Court, what the five dimensions that you mentioned to the relevant market are, give an idea as to how they apply in determining that concept?

A. Yes. The five dimensions of the product that is included—the product that is traded in the market; the geographic area within which the product is traded; the time period over the course which the product is traded, short-term, long-term or whatever; and the buyers that buy in that market and sellers—or that are affected one way or the other in the market; and the sellers that sell in that market.

* * *

[570] Q. But let me ask you, generally, if you would, to discuss the function of the time market in making the—this determination before we go on to the product market? A. Well, there are—there are several different aspects of time here. One aspect is the fact that whether things are traded every day or every week or every year, in general, in—when speaking about the television market—television as a market, contracts are on—for individual programs are either on a thirteen-week basis or twenty-six-week basis or thirty-nine-week basis or one-year basis or a two-year basis, so that one aspect of time is the number of trades that the time period between the transaction.

The second aspect of time, of course, is the fact that the television week divides itself up into seven days, and in terms of the television viewer's choice, the viewer has to make a choice on each one of those seven days. And that becomes an interesting issue because that makes the televised product what we call a perishable—what Congress called a perishable product; that is, if you don't watch the college football game on Saturday afternoon, you do not have the opportunity to watch that football game except if it's television replay, on Sunday afternoon. You can't—you can't save the product for another day.

[571] Q. And when are college football television games played? A. They are typically played on Saturday afternoon.

Q. Does that become a function of the time parameter of the relevant market, then? A. Yes.

Q. Would you explain the significance of that, Saturday afternoon college football time? A. Well, the significance of college football being played on Saturday afternoon is that — is twofold. First of all, it influences the audience that might be available for watching televised college football, it's a different audience than might be available if college football were played on Wednesday afternoons, for example.

A second aspect is because college football is played on Saturday afternoon, whereas professional football, which is the logical thing that one might think of if we are going to put two products, two candidate products in the same market. Professional football is played on Sunday afternoon, and by—for the professional levels, they retain their antitrust exemption, they are not permitted — that is to broadcast — their antitrust exemption to broadcast, they are not permitted to televise on Saturday afternoon. That means there is a de facto division of those two candidate television markets. You cannot televise — that is, professional football [572] telecasts cannot compete with college football telecasts and vice versa.

Q. Does that have an influence on your determination whether they are in the same relevant market or not? A. Yes.

Q. And in what way? A. Well, they can't be — they can't be in the same relevant market if the view — if the viewer is the ultimate determinant of the demand doesn't — can take advantage of both at zero cost; that is, the viewer doesn't have to make the choice of writing either the college football game or professional football game, the viewer can choose to watch either, or the viewer can choose to watch both with respect to the time dimension, that's a pertinent aspect.

Q. Is there any dispute or problem in this case as to whether the dimensions are of buyers or sellers, is that a point of contention here? A. No — well, we can look at the buyers in various ways, but the first buyer of the television rights and the broadcasters, and the sellers, in this timecast, the N.C.A.A. is the single seller.

Q. N.C.A.A. is the single seller? A. Single seller, yes, sir.

Q. Now, would you then explain to the Court, as to the area of the product mentioned in the market that is [573] mentioned here, what your determination has been and more particularly, what your process has been in making the considerations that you have given in making that determination? A. Yes. My determination is that televised college football is the relevant product and the considerations that I have given here are the same considerations that one would always give in determining relative product.

Q. Tell us what the general considerations are that an economist gives in every case and then particularize them for this case. A. Yes. In every case, we looked for both supply conditions and demand conditions, and we looked to determine what there is, close substitutability or perhaps more pertinently put, production flexibility on the supply side and — or whether there is another candidate product that is a close substitute on the demand side. And we attempt to — in theory, we would look at those two issues by considering on the one hand, the elasticity of supply on what is called the cross elasticity of supply, and on the other hand, the cross elasticity of demand.

And as a practical matter, in dealing with these, we discover two things. One, it's that the cross elasticity measure has some flaws with it, in dealing with it empirically; that there's a good deal of difficulty in measuring the cross elasticity in any event that the data are normally not available [574] to permit use to get a cross elasticity, so what economists generally do in this case is look at various proxy measurables that have other data that permit us to draw inferences about cross elasticity of demand and supply.

And generally speaking, the other things that we look at are the same sort of market indicia that were enumerated by the Court, in *Brown Shoe,* such as specialized customers, distinctive uses, production flexibility, extensive differences in price and so forth.

Q. You say that you can't go in with some measuring device and determine exactly and put it on your calculator as to what the cross elasticity on demand is in the ordinary situation? A. In some situations, if — if we had enough — if we had enough data and some ideal situations we could do it. In most situations, we can't do it, that's correct.

Q. And if you had all the data theoretically, you could make a calculation and come up with a number? A. That's right.

Q. Does that sound right? A. That's correct.

Q. But in this instance, it's your testimony that it is not possible to operate with that provision? A. That's correct.

Q. Now, explain what that is, please. [575] A. Well, that's the case for several reasons, but let me just give an illustration, by talking about what the cross elasticity of demand is, and I think that will make an issue clear.

Q. Please do. A. The cross elasticity of demand is intended to reflect the sensitivity of the demand for one product to small price changes in a second product; an economist talks about the small price changes, or prices they mean, in this prose, elasticity context, there is a price increase of perhaps one percent, so when we talk about cross elasticity demand, what we would be—the kind of question we would be asking would be the following—if we're talking about any product in general, we would ask the question, what is the percent change in quantity demanded of product "A" as a result of a one-percent change in the price of product "B"?

And then vice versa; what is the percentage change in demand of product "B" of a one-percent change in the price of product "A"?

If, in fact, what we — what we discover is that the demand for product "A" increases when the price of product "B" — when the price of product "B" rises, then we — then we

would say those two products are substitutes; that is, when one price rises, we shift our demand to the — to the second product.

[576] Now, the —

Q. If Safeway raises their prices nine hundred dollars, and people buy more foods, then they are in competition, is that right? A. Well—

Q. I mean, that — ninety dollars. A. Well, no, ninety dollars is in some sense too big, also, because in that sense, you see a lot of kinds of products compete, for example, two well-recognized products, two products that are recognized in the courts are beer and wine; that is, a series of cases in which beer has been recognized as a relevant market, and some in which wine has been recognized as a product market.

Now, I know many people that don't drink either beer or wine, I know many people that drink beer, I know many people that drink wine, I know many people that drink both beer and wine. But those are nonetheless separate markets in the sense. If one is faced on a given evening between buying a bottle of beer at dinner for a dollar fifty, or buying a bottle of wine for ten dollars, on — on one occasion might choose beer, and the next time choose wine, but if the price of beer, instead of one fifty, would rise a one cent, one percent, and become one fifty-one or a dollar fifty-two, it is not determined that the person that was buying the beer would switch to wine, but if the beer were [577] to go from one fifty-one, and increase up comparable to your -- to your chevrolet and, say, six dollars and fifty cents for beer, and ten dollars for the bottle of wine, that might be sufficient to cause the beer drinker to switch to wine, so that when we talk about —

Q. But not sufficient for the economist to say, "You are in the same" — A. That's correct, not — not for the economists or courts to say they are in the same market, nor that they are substitutes, as we talk about substitutes.

Q. But if the price of one beer went up a few pennies, would that affect the sales of another beer? A. Well, it depends on the many, many — in many cases, the answer —

THE COURT: Mr. Muchmore, would you let the witness finish his statement, please, sir?

MR. MUCHMORE: Yes, Your Honor, I should be doing that.

A. Yes, in many cases, the answer, of course, is, yes. If one guy goes out one evening and discovers that Budweiser is a dollar-and-a-half, and Miller Lite is a dollar-and-a-half, depending upon your preference, you might flip a coin or tell the waiter or waitress to bring you either, and you go in the next night and discover that Miller's raised to a dollar fifty-five, and Budweiser is still a dollar fifty, [578] you might then order the Budweiser, so in a sense, those are in the same market.

Q. Is your hesitation, when I said, "all beer," because the price of Heinken's changes, that may or may not increase the price of Budweiser? A. Yes, that's also true, and it is also a little known fact that saki is defined as a malt beverage, so perhaps in the same market, in some sense —

Q. Would you proceed, then, with your analysis of the — I think you were explaining — A. Yeah.

Q. —how it is that cross elasticity cannot always be measured and what it means and perhaps then we can particularize that to the college football question? A. Yeah. Well, in—well, to particularize in—so about what we need, then, in order to measure cross elasticity is some lengthy history in order to separate the various factors that impact on the demands for products. We need some lengthy history of transactions and lengthy history of data.

In this specific instance, however, we have neither the exact things that—the exact data we want, nor do we have a lengthy history, so if we are talking about who demands college television football, we can look at that in two or three different ways.

[579] The ultimately—what we are—what we are interested in—interested and concerned with is the consumer, and consumer is the demand for college football. The consumer does pay for college football. A consumer is not directly charged for watching a telecast, so we don't see the consumer who turns on the television set and pays the same zero price for turning on college televised football today, as he paid fifteen years ago. So that we don't have that kind of price data to estimate the consumer's cross elasticity for product demand, but we do know that what—what advertisers are willing to pay for college televised football, and advertisers are going to pay for college televised football because they want to be able to send their messages to consumers.

So the advertisers for that—it's derived from the demand that the consumers have. Similarly, the networks and individual broadcasters demand—the demand—the broadcast rights for college televised football, they can sell those televised rights via commercial messages to advertisers, so that we have two different derived demands, but now our problem in looking—in attempting to measure cross elasticity using the prices that—using the prices that are charged to either advertisers or the prices that are charged to the networks is that we do not have the necessary lengthy series of prices that permit us to measure—to measure elasticity.

So that if we're talking, for example, about measuring [580] the cross elasticity of, let's say, meat or fish, we can have — we have — a subject that I have done some work with, we have monthly figures on the price of meat, monthly prices on the average price of fish, and so forth, and we have a series that goes back twenty some odd years, so we can have several hundreds of observations and attempt to use sophisticated econometric techniques to measure these cross elasticities.

When we're talking about the price of college football, however, what we have are a series of two and four-year contracts, prices changing every couple or every four years, we

have — it is not clear what advertising rates are, and those are sometimes up on a one-year or two-year basis and so forth, so we just don't have the data available.

Q. Would you tell the Court, then, with the specific data not available, how you have proceeded to make a determination as to the elasticity of supply or the substitutability or whatever the phrase, in this instance? A. Well, with respect to the cross elasticity of supply, there is really not much of a problem. That is to say, on the one hand, the people that are producing other candidate products, other kinds of television programs, for example, yesterday in Court, professional baseball was mentioned, the Marty Lamore Show was mentioned. The people that are providing professional baseball cannot provide college televised football on Saturday. The people that are [581] producing the Marty Lamore Show cannot provide college televised football on Saturday. Similarly, the seller of college televised football, namely the N.C.A.A., cannot, to the best of my knowledge, produce either professional major league baseball, nor can they produce programming comparable to the Marty Lamore Show.

Q. You're talking now about the elasticity on the supply side? A. On the supply side, yes.

Q. And it's also necessary, then to analyze it on the demand side? A. Yes.

Q. And, in fact, that's what most of the discussion has been about, has it not? A. Yes, most of the previous discussion before in court has been related to, at any rate, the cross elasticity on the demand side, and as I indicated, I have been interested in this issue and gathered data and looked at data and analyzed data on this issue off and on over the course of the last twelve years.

The particular data that I have gathered and looked at have been data on such things as broadcast rights, who sponsors college television — college television football, who

sponsors other professional sports — other televised sports, and who sponsors other television programs?

[582] These data have been gathered from sources such as in a particular broadcast magazine, and I have also looked at the various Nielson reports that have provided me with data as far back as 1964, and as recently as 1980. The Nielson Company puts out annually a book of data that's called — the titles change over time, it's called something like a "Look At Sports," and these are very detailed data that have ratings, some cost figures, demographic figures for televised sports, in general.

The Nielson Company has been very nice to me over the years, and when they subscribe to the service, in order to get it regulated, but after the data becomes out of date, if I want the data, they will be nice enough to let me have them, so that the most recent data I have on that is 1980, but the data I have looked at go back as far as 1964.

Q. You were saying, then, that you have given this specific question to the relevant product market, college football television and elasticity demand, is one that you have given attention to over a period of years? A. Yes.

Q. And would you tell the Court, first of all, had you reached a conclusion prior to your being retained on this lawsuit? A. Yes.

Q. Would you tell the Court what that conclusion was [583] and then with specificity, would you refer to what you have learned from each of those sources that you spoke of as to the broadcast rights, the sponsorship and the ratings; detail what has led you to the conclusion that you have reached? A. Would you mind repeating just the first part of that question? The rest, I think I have.

Q. I think I first asked you to state what conclusion you have reached — A. Yes.

Q. — prior to your being retained. A. The conclusion that I reached is that college televised football is a recent market.

Q. And specifically as to the elasticities — A. Yes.

Q. — of supply or of demand. A. Cross elasticity, specifically with respect to the — actually, the two happen to be related, but specificially with respect to the cross elasticity of demand, that as far as television viewers are concerned, as far as sponsors are concerned, the television viewers viewing television on Saturday afternoon, on Saturdays, as far as sponsors that are seeking to sponsor on Saturdays, and as far as the networks are concerned, that there is no close substitute for college televised football.

Q. Now, would you have testified to the things you [584] looked at, broadcast rights, sponsorship, ratings — now, would you please tell us what you have seen when you have looked at those things and how it leads you to the conclusion that you have reached? A. One of the first things that one does is one looks at the programs that are telecast on a Saturday afternoon. I have done this over the course of not — not every year, but of several years, let's say, from 1971 through 1981. I did this with specific respect to this case because I was curious as to what's on, on a typical Saturday afternoon, and my own impressions of it. And I did this looking at New York and Chicago, being two typical and large television areas.

And on a Saturday — typical Saturday afternoon, in New York City, you will get the — at the time that televised college football is on, you will get on — I can't remember which network, N.B.C. would have — C.B.S. would have Bullwinkle; N.B.C. — which is a cartoon program, I understand N.B.C. might have the Tom and Jerry Show, which is a series of comedy shows; the independent stations might run a movie or some rerun of "I Spy" or some such program.

So the initial suspicion that one has is that the typical television viewer that would be watching college football would

not typically switch to — would not typically be interested in watching Tom and Jerry, for instance, or [585] Mr. Bullwinkle or the eight reruns of "I Spy," so one asks the question, if you kind of think that, let's look to see who sponsors typically the television programming in general and let's look to see who sponsors the college televised football?

And in 1981, for example, a broadcasting magazine listed as the five principal — as what they — when they give a list of major sponsors of televised sports, the college — college televised football, the five companies that they listed were Chevrolet, Miller Brewing, Schlitz Brewing, Anheuser Busch and Texaco.

In the past, the kinds of names that popped up in addition to those names are companies such as Goodyear, insurance companies, United Airlines, this kind of thing. The judgment that one — that one — now, these companies are kind of interesting in the sense that if you look at the largest sponsors of network programs, these companies don't necessarily fall into that category, so that the largest sponsor of network television, in general, is Proctor and Gamble. Proctor and Gamble doesn't — does not appear on this list because they appeal to an — and they are interested in getting their messages to a different kind of audience, namely they are interested in getting their messages to audiences for programs at the same time on Friday afternoons; that is, the audience that watches "The Young and the Restless" and "Doctors" and [586] "Mike Douglas" and kind of programming that typically appear on a weekday afternoon.

In terms of an inference that one makes about the cross elasticity of demand, we look at the price that, let's say, the Miller Brewing Company is willing to pay to sponsor the college televised football, and according to the Nielson data, the average — the average price for a thirty-second slot on college television football on Saturday afternoon in 1980, was forty-seven thousand nine hundred dollars for a thirty-second slot.

Logically, one doesn't consider that the Miller Brewing Company — if the price moved up by one percent and became — instead of forty-seven thousand nine hundred, it became forty-eight thousand four hundred, one cannot see the Miller Brewing Company shifting their sponsorship to Bullwinkle or Tom and Jerry, nor can one conceive of Miller Brewing sponsoring Tom and Jerry, or Bullwinkle.

So logically, we would not think of those kinds of products as substitutes. So what we look at, we ask the question, what does it cost—what does it cost the sponsors to sponsor college televised football? And there are other kinds of sports programs that might be logical candidates to be in the same market as college televised football. Is college televised football indeed distinctive? Not just in terms of kinds of companies that are sponsoring it, but what [587] those companies expect; that is, audiences that the companies want to reach, the television viewer, and what one discovers is that it is expensive to televise college televised—to sponsor televised football, but that these companies are willing to pay the price, which indicates that televised football is a—is a distinctive—is a distinctive product.

What makes it a distinctive product?

Let me answer that—that question by taking the second candidate sport that one might think is somehow comparable to televised football. If one is going to try to draw some comparability between sports—and yesterday, the issue was mentioned of major league baseball.

In 1980, the cost of televising football, as I indicated, the cost of a thirty-second slot was forty-seven thousand nine hundred dollars, that's a lot of money. The cost of televising major league baseball on Saturday afternoon during that same season was seventeen thousand one hundred dollars, for a thirty-second slot.

So that the sponsors of college televised football are willing to pay considerably more per thirty-second slot for the privilege

of televising—televising college football versus what they are willing to pay for the privilege of televising major league baseball. Now, there has to be a reason why they are willing to pay more, and the most obvious of those reasons is that college televised football gets a [588] larger audience than does major league baseball, but that's not the whole reason, because if we look to see what is the cost of televising college—of televising college football versus televising major league baseball, the cost per thousand households reached, which takes into consideration the viewing factor, the cost of televising major league baseball in 1980, was five dollars and—I'm sorry—cost of televising college football in 1980, was five dollars and thirty-five—five dollars and thirty-five cents per thousand homes reached.

The cost of televising major league baseball was three dollars and four cents per major league—per thousand homes reached; that is, it cost seventy-five percent more per thousand homes reached to televise college—to sponsor a football sponsorship versus a major league baseball sponsorship, and now we again have to ask the question, why is it that these companies are willing to pay more to send their message to a household that is watching football versus a household that is watching baseball? And the answer has to be because of the demographics. The difference is in the audiences that are watching it, too, and this is true with respect to all sports, as well as with respect to all programming.

If we stick to the major league baseball example, since that's where I started, it turns out there are two things that are true with respect to the college—the audience for college football. One, as has been previously indicated in [589] court, is primarily a male audience; that is, in 1980, fifty-six percent of the viewers of college televised football were males above the age of eighteen. Within that category of the males above the age of eighteen, something like fifty-five percent of that group were males in the age category twenty-five to forty-nine; that is, the males that have the—that is, the people that have the principal buying power.

If we look at major league baseball, the proportion of males, the proportion of males is slightly less in proportion of women is much more, because of the teenage audiences, but there's a large portion of women, generally speaking, that like maybe good league baseball, as opposed to college football, and it turns out a male percentage of those people is in the twenty-five to forty-nine buying group, than is college football so that college football has a better age distribution from the standpoint of this particular group of sponsors.

The other very interesting kind of data that one looks at are the income—is the income distribution of the households that tune into these games, and that's what really is a very fascinating kind of subject here.

If we look at major league baseball, for example, and specifically during 1980, the television ratings by which were discussed in court yesterday, if we look at households of less than ten thousand dollars, which it turns out there are considerable number of those, if we look at households of less [590] than ten thousand dollars income, the average rating for major league baseball during the Saturday afternoon, during 1980, was a rating of seven point three; that is to say, seven point three percent of most households with income—of those television households with less than ten thousand dollars of income, tuned in major league baseball.

If we look at the income group between ten thousand and fifteen thousand, the figure is seven point seven percent. If we look at the figure of fifteen to twenty thousand, the rating is seven point five percent. And if we look at the over-twenty-thousand-dollar income, the television rating is seven point three percent; or, in effect, major league baseball draws a rating of somewhere around seven percent, seven point five percent, and that's overall distributed incomes.

If we look at those precise income categories for college televised football during 1980, in the income below ten thou-

sand—households below ten thousand, the Nielson figure for Saturday afternoon is seven point two percent rating. If we look at income between ten thousand and fifteen thousand, the Nielson rating is ten point eight. If we look at the income level between fifteen thousand and twenty thousand, the Nielson rating is fourteen point three. And if we look at the income of households above—if we look at the ratings for households above twenty thousand in income, the rating is fifteen—fifteen point three.

[591] So that the difference in the income level of the viewers of college televised football versus major league baseball is considerable; that is, it's a different set of households, a different set of viewers that are watching the two things, and that's the reason that sponsors are willing to pay so much more for getting their messages to the football audiences, as opposed to the baseball audiences, is that it's a more affluent audience, a greater percentage made up of males, and it's males that have income.

That's why Miller Brewing, for example, is perfectly delighted to show their commercials on college televised football, they have over-the-hill, athletes and very pleasant messages to the rest of our over-the-hill, athletes, that are watching college televised football.

Now, I just brought up the baseball example because that happened to be mentioned in court yesterday. I brought up 1980, because that's the most recent set of figures that I have available, but give or take a percentage change, depending upon contract years and so forth, that's the descriptive of, say, the college televised football and major league baseball. There would be different — excuse me, a different kind of demographic structure for other kinds of televised sports.

Q. And those are the factors that led you to the conclusion that you reached as to the product market even before you reviewed the materials in this lawsuit and heard [592] the testimony? A. Yes, sir.

Q. Have you seen in the course of your preparation for the lawsuit and in the course of being in the courtroom, additional data that you consider relevant to the question of relevant market? A. Yes.

Q. And would you tell the Court, first, whether that has affected your conclusion, supported it, diminished it, and then would you explain what the data is and what effect that has had on you? A. All the data that I have seen and all the testimony that I have heard simply supports the conclusion that I previously reached. Data specifically with respect to Oklahoma City, and viewing habits in Oklahoma City, indicating a larger percentage of television audiences for college televised football is the older male group versus other kinds of programming. The fact that these viewers don't watch — that these viewers are not necessarily the same viewers that watch prime time or six to seven thirty television programming and vice versa, and data with respect to the price — the advertising rates in the — I believe it was the advertising rates for college televised football versus — per viewing point for college televised football versus the cost of televising the other programming that was on at comparable hours on Saturday, [593] indicating that these are separate — separate audiences with different interests, watches the two programs and differs — might be some overlapping sponsors, but basically, sponsors attempting to appeal to a particular kind of audience sponsored televised college football.

Q. Thank you, Doctor Horrowitz.

Now, on the question of the anticompetitive effects of the arrangement, generally, what — briefly, what conclusion have you reached in that regard? A. The basic anti — the basic anticompetitive effects of the agreement is that — or the current broadcast arrangements are that they serve to raise price, price paid for television rights. They restrict output, they restrict the amount of college — not amount of televised football, and they restrict the viewer's choice.

It limits the games that the viewers can watch, which are different from those games that they might watch under competitive market.

Q. Have you made a determination, by the way, as to whether the N.C.A.A. does have market power or monopoly power in the relevant market that you have determined? A. Oh, yes, they are — they act — for broadcasting purposes; that is, for the purpose of selling broadcasting rights, the N.C.A.A. acts as a cartel, it is a monopoly, it is the single seller of those broadcast rights. As the [594] single seller, they have market power.

Q. And do they have the power to influence the price that the product is sold? A. They certainly do.

Q. And what do you base that conclusion on? A. They are — well, based on the conclusion they're a monopoly. They sell what is literally the only game in town, and they are selling a product which has demand — I measured the — I haven't measured the elasticity of demand, but they are selling a product that people want and people are willing to pay for.

Q. Now, there has been a suggestion or contention that there are benefits that flow from the college football program. Would you comment, generally, on the real or perceived benefits of a situation of this type? A. Well, it's certainly true that there are beneficiaries from this program. In this sort of arrangement, some people gain — some gain, some lose, and some gain or lose more than others. I have indicated the principal losers in this are the consumers who have the restricted output, suffer the restricted output and suffer the diminution of choice. Initially, they lose in that respect.

Insofar as the television rights payments are larger than they might otherwise be, that isn't, insofar as the cartel, as affected the sale of broadcast rights, so sponsors pay [595] more than they might otherwise sponsor, and insofar as sponsors end up paying some portion of that higher, to the extent

that sponsors can, in fact, pass on a portion of those higher advertising expenses on to consumers, then we are all losing in that respect.

It's also true that there are some schools that are participating in this arrangement that are losers; that is, schools that might, if they were let on their own to sell their television rights in a free market, schools that might do better selling on their own than they would do in sharing in the N.C.A.A. plan. Schools such as — take Oklahoma, comes to mind, that's been talked about today and yesterday. Historically, Notre Dame, for example. I would not be surprised if Norte Dame were able to have a television impact, so there are some schools that might lose some, and there are some schools undoubtedly that benefit from this.

That is, there are some schools — well, to go back — regional schools that might appear on television might lose something through this thing.

Q. Let me ask you — A. Yeah.

Q. — about that, you did — A. Yeah.

Q. — refer to O.U. as a loser perhaps under the plan, but you said that schools that might appear on television [596] that don't, you weren't including O.U. in that category? A. No.

Q. Would you explain to the Court, based on your experience and study of broadcast sports, how you analyze it as to what kind of schools might appear more than they do now, and why that would be? A. Yeah. Yeah. The kinds of schools that might appear more than they do now are the—let's say, the middle range of schools, of — schools that are not necessarily football — well, that might be small schools, as well as — I attended John Hopkins University, for example, and our big rival was Western Maryland. Of course, this isn't the Dark Ages, that was in the early Fifties, but it was a great thrill to us when one of the local television stations televised John Hopkins and Western Maryland, but it is not inconceivable that they

would pick that game up yet and have it -- maybe televise it — well, televise it — well, say, schools such as the University of Kansas, which I don't know how often the University of Kansas has appeared over recent years, they have not been a football power of the magnitude of, say, Oklahoma or Nebraska. But having lived in Kansas City — as I indicated earlier, having lived in Kansas City for a year, and my wife — I lived in Kansas City, but my wife commuted forty miles to the University of Kansas, forty some miles to get a master's degree, we have been quite interested [597] in watching the University of Kansas on Saturday, and I suspect that Kansas City — in general, people are interested the University of Kansas, even though they lived on the Missouri side, and we would like to have seen the University of Kansas, and I suspect today they would like to see the University of Kansas on football — play football on Saturdays, televised locally. The University of Kansas is just one example —

Q. Well, using that —excuse me. A. It's just one example of a — a football team that is not a power, and I suspect hasn't appeared very often on T.V., but might appear if they could sell their rights locally, same might be right of Tulsa University, for example. I don't know whether Tulsa University has appeared on television or how often in recent years. I do know I saw them beat Florida and apparently a year or two ago, and I think they are an attractive team to watch on television.

Q. Do these schools, such as Kansas and Tulsa, have enough of a popularity to justify their appearance on a national broadcast very often? A. No.

Q. Do they even have enough popularity to justify an appearance frequently around the country, of that team if the country is split up into just a few regions? A. Not — not — schools like — well, like Tulsa, [598] I can't really speak about Kansas — I would say, generally, no.

Q. So you are speaking then of the potential for local television for stations? A That's right. That's right.

Q. Now, you have indicated who some of the — some of those who have not benefited under the present plan, would you explain to the Court who you see as the beneficiaries of the plan? A. Well, N.C.A.A. certainly benefits from the plan. N.C.A.A. keeps control of the college football. They get eight percent — I believe the figure is eight percent of the — of the revenues, so that they benefit from the plan. The network that sponsors the college television football certainly benefits from the plan, and it benefits from the plan relative to the independent television networks, relative to, as we heard this morning, S.T.V. out in California, so it's the large oligopolies, the network, that benefits from the plan, the sponsors benefit from the plan; that is, the major national corporations benefit from the plan. In the absence of which local sponsorships, for example, might be available to smaller companies, regional companies, local companies, which can't afford to — to compete with — or sponsor nationally with Miller Brewing, Anheuser Busch and the likes of those companies.

[599] So that the major companies in a select number of industries benefit also from this kind of a plan.

* * *

[600] Q. Have you in the occasion or your broadcast study — study of broadcast college events, given any attention to the question of effect on attendance and televising college football games? A. In the course of my studies over the — well, the last twelve years, and particularly between 1970 and 1978, [601] when I did an awful lot of work on the subject, yes.

Q. What kind of work have you done and what have you read in that regard? A. I think that I have read virtually — prior to 1978, I would have read — expect virtually everything that was available — available to me on the impact of attendance — the impact of television on attendance in sports, generally. I have done my own work in some — some analysis

of my own with — in various ways, with particular respect to professional football, particular respect to professional — specific respect to professional baseball.

Q. Have you read — A. I have read the — in connection with this case, I was previously aware of the studies that were done from — and knew the general conclusions of the studies that were done for the N.C.A.A. back in 1949 through 1956, the Norwalk —

Q. The N.O.R.C.? A. I'm sorry, the N.O.R.C. studies, I'm certainly aware of them, it was written up in the *New York Times*, what they had to say and general conclusions, in connection with this case, I have looked into those in greater detail.

Q. And have you formed an overall conclusion then as to what those — all the studies that you have read — you say you have tried to read all of them — have been, as to what those studies demonstrate as to the relationship between [602] football television and live attendance? A. The answer is that one cannot make a generalization. I hate to be — I hate to hedge on this kind of thing, but what I believe most people discover who look into this thing carefully, is that there are some cases where live television, either of one's own games or live television of other's games, will impact adversely on attendance, either in certain professional sports or in college football.

There are other cases where it has no effect whatsoever. There are some cases where television clearly enhances attendance.

On balance, I think one cannot reach a generalization.

Q. Directing your attention specifically to the N.O.R.C. reports, would you evaluate, briefly, for the Court, what conclusions you have reached about those reports and what they did demonstrate or what they do not? A. Well, the first of

the reports, I think, reached a reasonably fair conclusion, not necessarily on the correct basis, but I think they reached a reasonably fair conclusion, namely that television might perhaps impact on attendance at football games, but that it was too early to tell. Namely, it was too early to tell because at the time that these studies were being undertaken, television was just beginning to spread and it didn't spread evenly throughout the geographic United States, and there was another—so that we couldn't really [603] determine the impact on television — of television on televised sports.

Moreover, in addition to this being a period in which television was new and it was just beginning to spread, there was a second factor that was overlooked in these reports, namely, the base years on which the reports or the years in which the report started were — the base years, I believe, were — from which all other attendance was looked at, I believe were for 1947 and 1948, but the point is that this was just after the war, and we're talking about — we're talking about entirely new climate, we're talking about just a dynamic — dynamic point in time, so that, for example, if — it's not inconceivable to me and I do not have the data available that 1947 to 1948, which were years prior to which college attendance — attendance — live attendance at football games began to fall, those years might have been exceptionally high years, for example.

We don't—we don't really know that. But those reports generally did—what they generally did was—was to look at the fact that television sales were growing, the fact that college football was at the same time beginning, and only over a couple—over about a three-year period, by the way, and then concluded from that, that television must be having an adverse impact on college football attendance.

Now, they try to do this in a slightly more sophisticated [604] way, not necessarily successfully, but this kind of conclusion, based on very small data, it's very interesting. It's—it's exactly the same kind of analysis in statistical books, when we

teach relationship, to show our students how careful we have to be in that sort of analysis. Instead of having college football attendance on the left-hand side of the column, and television sales on the right, they usually have something like—and I'm not being belligerent, I'm using the exact thing that is used—the number of—number of cases of certified insanity, and those that grow on the left-hand column at the same time that college football television grows, so the argument is made, would you conclude from that, that—I'm sorry, at the same time—sales of television sets have grown, and the question is, would you conclude from that, that the sales of television sets or that television has contributed to the rising level of insanity in the United States?

Well, I think the anwer, generally speaking, is, no, and we can recognize clearly why the answer to—we think the answer to that is no, and we can recognize why it was no, and the same thing is true of the N.O.R.C. report. We don't have enough data in there. We have to analyze those data in a very—in a very careful way.

The other thing that's true about those reports is that they were, as I indicated, related to a period immediately [605] after the First World War, they related to a period during—Second World War, related to a period also during the Korean Conflict, 1951 and '2, television was new, it was a novelty and the experience on even—even if the inferences they drew were, in fact, valid, that television in its birth did—in fact, did happen to have an adverse impact on attendance, that certainly doesn't say what the impact would be today, twenty-five—twenty-five years later, now that we are all adjusted to watching television and sports on television.

* * *

[606] Q. (Mr. Muchmore, continuing.) Does it appear to you, Doctor Horrowitz, that the N.C.A.A. television plan does have the effect of distributing the income from television on a more equal basis than it might under a free competitive market? A. I expect that it is so.

Q. If that is the case, would you take that as a pro-competitive virtue of the plan? A. No.

Q. How would you regard it? A. Well, it doesn't impact on competition, the distribution of the total pay — or of the total broadcast rights. The equity of the distribution of broadcast rights doesn't have any effect on the competition in the relevant market.

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[609] Q. Have you reviewed the new contracts for next year with the N.C.A.A. and the "Principles of Negotiation" and the ground rules, for two network schedules, to be in effect starting with 1982? A. Yes, I have.

Q. And have you analyzed with a view as to whether anything in those changes your conclusion as to the anti-competitive aspect of the plan as it now exists? A. Yes, I have.

Q. What do you conclude and why? A. As far as competition is concerned, in the relevant market there is still no competition for televised — for televised football; that is, the cartel still sells the games [610] and the games do not have competition from other televised games.

Q. What about price? A. I'm sorry, live televised games, there is no competition for live televised games.

Q. What about competition between the two networks? A. There is no price competition between the two networks. They have a very friendly arrangement with respect to how the games will be divided up between them, and the fee is the same — the fee that will be paid for the games is the same under each contract.

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[611] **JAMES E. HIBDON**

was called as a witness by the plaintiffs, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Muchmore:

Q. Would you state your name, please, Doctor Hibdon? A. James E. Hibdon.

Q. What is your profession, please? A. I'm professor of economics, University of Oklahoma.

Q. That is, of course, the University of Oklahoma which is a plaintiff in this lawsuit? A. That's correct.

Q. How long have you been at the University of Oklahoma? A. This is my twenty-first year.

Q. And how long have you been a full professor? A. Since 1967.

Q. What other colleges or universities have you been affiliated with prior to that time? A. I taught at Georgia State University for my first full-time teaching job, and then moved to Texas A & M.

Q. And in what area were you teaching in those schools? A. Economics in both cases. And specifically my area is price theory.

Q. What is your educational background, please? A. I attended both Oklahoma Baptist University and [612] Syracuse University, but my bachelor's degree is from the University of Oklahoma in political science. My master's is from Oklahoma — University of Oklahoma in economics. My doctrate in 1957 was from the University of North Carolina.

Q. You have stated that you have a specialty area of price theory. Would you say a little bit more about that as to what price theory is and what kind of application price theory has in

economics in the real world? A. All right. Price theory is sometimes called microeconomics and it's a study of how markets operate and prices as a coordinating mechanism in the economy. It considers such factors as the determinate demand for product, the characteristics of that demand, the determinates of supply and the characteristics of the supply functions, and considers how those factors are put together; that is, demand and supply operate in the market and in various kinds of markets to determine prices and output in various periods of time.

The markets considered usually are pure competition on the one hand, and at the other extreme is monopoly, and in between those two, we have two types of markets called monopolistic competition and oligopoly.

Q. In being a professor at the University of Oklahoma, do you also stay abreast of developments in the field of economics, generally? A. I try to.

[613] Q. What — have you published books or articles relating to the field of economics? A. Yes, I have one textbook, *Price and Welfare Theory*, which was published in 1969 by McGraw-Hill. I have contributed to other books and I have some articles in journals and a monograph, joint author of a monograph.

Q. And have you also been employed during the time you were at the University of Oklahoma by the United States Government? A. I had a sabbatical leave from the university and spent fourteen months as advising scholar in the Department of Commerce in 1977 and '78.

Q. What kind of research did you do there or work? A. I was in the economic development administration in the office of research of that particular branch and study there was concerned with the variations in income among various counties

and other areas, cities, even in the nation, and some of the determinants and what could be done to help what were called distressed areas.

MR. MUCHMORE: We would tender Doctor Hibdon as an expert in the area of economic theory generally, but specifically microeconomic price structure.

THE COURT: Doctor Hibdon will be so accepted by the Court by virtue of his training, education and experience.

[621] Q. All right, sir. And, now, have you determined whether the television plan and contracts would have an impact on what you described as the free market part of the state? A. Yes. I think there are some significant impacts. In the first place, the producers of games don't actually sell them. What we have is an intermediate organization, N.C.A.A. television committee, which negotiates contracts with networks; previsouly to '81, it was a recent agreement with one network, the last sixteen years, it was A.B.C. which won that right or paid for that right to televise.

The television committee of the N.C.A.A., while not a producer, then is a seller, so it acts as a central sales organization for the producers of games. I'm calling the schools the producers of games. It negotiates, as we have heard in previous testimony, some minimum aggregate fee for a package of games which they specify involved so many national and so many regional games, and that minimum aggregate fee then establishes as the minimum amount that the network must pay for that set of games.

The network at that point — up and through '81, achieved an effect, a monopoly, in the transmission of college football games because you only had one network, then, that was selling college football games over there, either nationally or regionally or in some cases seminationally.

The network then would offer — would tell the schools [622] that it chose — whose games it had chosen to televise,

that they had made such a decision and tell them what price they would pay for the television rights.

The schools would then accept that statement and the television then would proceed.

What you have there is a foreclosure of the options of the schools involved; that is, they no longer had an opportunity to sell to anybody else; they had to deal directly with a network, so that meant both is a monopsony. It's the counterpart of the monopoly, but on the other side of the market. So you had one buyer then who stated a price. The schools, on the other hand, had no options as they would have had under a free market situation, no alternatives for sale. Occasionally under the exceptional rule, they could have some local sales, but those were comparatively trivial in terms of income, as I understand it.

The result was that the colleges then were going to put on the game, so they had all the costs of that, they had the revenues from the gate sales, and the only question that arose then, should they have additional revenue from the sale of those rights? There was no cost, the marginal cost of the rights was zero to the school. So what we find then is that schools who were the sellers of these T.V. rights were placed in the position, since there were no options, in a perfect elasticity of supply of goods, it was a perishable good, they [623] could take it or leave it since they didn't have options, and for that reason, then, they didn't have any bargaining precedence, any ability to bargain, because of the foreclosure of options.

We see to that, of course, under this arrangement, the number of games that would be televised was specified and that of course, fixes the number of games that would appear on television.

Q. What is — how do the economists refer to that, the number of games and quality of games that are put out? A. Well, that's restriction of output and, of course, the general

arrangement that I see there is if we have a cartel in operation, which you have a central selling agency operating to represent a group of producers.

Q. And do you find the price dispersion that you predicted in the open market? A. No, there was no price dispersion. You had a different level of prices for national games and for regional games in any one year, but they were constant. They did not reflect faulty variations in the games as you would normally expect. For example, I looked at the ratings that the N.C.A.A. prepared and saw that the ratings varied from, I believe it was seven point seven, to eighteen point four, so that the ratings of the highest game was about two-and-a-half times as much as the lowest there, and presumably that much more [624] valuable to the stations and to the advertisers. If you will look at only the big games, the survey showed that the ratings varied from ten point two, I think it was, to fifteen point nine, so about fifty percent more for the highest game.

Now, you would expect then enterprises to reflect some variation in quality or anticipated equality of the game, but, in fact, they did not.

* * *

[625] Q. Well, what do you conclude as to whether output has been restricted as to the premarket condition? A. Oh, it definitely has been restricted.

Q. And what effect does that have on the consumer? A. The effect on the consumer is, of course, to narrow his choice, and while that may be of benefit to the producers, it is not a benefit to the consumer. The options are made [626] and the games that they may prefer to watch are not shown because of that restriction on the number of games that can be shown.

* * *

[628] Q. Doctor Hibdon, finally, there has been testimony as to the potential for success and the success of the N.C.A.A. as a

cartel, compared to other cartels. Do you have your own thoughts on where the N.C.A.A. stands in that respect? A. Yes. The history of cartel shows that they tend to break ground after a while because there is always somebody in the group that wants to cheat, and sell at more than they are supposed to, or to produce more, or both, and so one of the problems of the cartel is how to police the arrangement to see who is doing this sort of thing and levy some sort of penalty, so it is a policing and preventive arrangement.

One of the more effective ways to have a cartel is to have a central selling agency so that no one can sell outside of that central sales agency, and that's what we have here.

But they can derive the Saturdays and Sundays among cartel members on how the money — how the games are distributed among the participants in the cartel, and that begins to be partly a political and partly an economic question, and if [629] a cartel is going to survive, then it has to determine who are members of the cartel to keep the thing from decreasing.

It appears to me that the N.C.A.A. has had to remember — had to revise the provisions in the contracts going to networks, contracts are a reflection of that fact; that they are trying to keep more people in the cartel.

Certainly getting some of the — N.C.A.A. will not get some, so they will be placeted. On the other — this is evidence, I think, of the fact that they haven't been totally successful in that, and I would, in fact, like to break away from it, and they are trying to prevent that.

* * *

[645] **JAMES FRANK**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Would you please state your name and address, sir? A. James Frank, 601 Jackson Street, Jefferson City, Missouri.

Q. And what is your occupation? A. I am president of Lincoln University in Jefferson City, Missouri.

Q. And can you tell the Court briefly about what Lincoln University is? A. Lincoln University is a state-supported institution in the State of Missouri; been in existence since about 1866, and it is a part of the statewide system of higher education in that state.

Q. Now, do you occupy a position in the N.C.A.A., as well as being president of Lincoln University? A. Yes. I am the president of the National Collegiate Athletic Association.

Q. And how long have you held that position? A. Oh, since January of 1981.

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[648] Q. Now, Doctor Frank, in addition to serving there as president, you said you had served in the N.C.A.A. When — what was the first type of service other than being a member, [649] as your have said, in division two? A. Yes. I think the first committee that I served on within the N.C.A.A. was on the long-range planning committee of the National Collegiate Athletic Association, and that was before 1974. I am not sure of the exact date that I accepted that appointment.

Q. Before what date, sir? A. It was 1974, but I am not sure of the exact date.

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Q. And how long did you serve on that? A. I served on that, I think, approximately two years, until I was appointed to the N.C.A.A. council, elected to the N.C.A.A. council.

Q. Would you tell the Court what the council — what the council function is? A. Well, the council is the body that acts in between [650] the conventions. The ultimate authority within N.C.A.A. is the membership, and the council is authorized to take actions on behalf of the N.C.A.A. when the convention, of course, is not in session, and that amounts to about four times a year.

Q. What is the convention procedure, Doctor, the annual convention? A. Well, the convention is held, of course, once a year, and that is the time when members and the council will submit legislation to the entire membership; delegates, representatives from all of the member institutions will come to the annual convention and vote on the proposals and legislation that is before the annual convention.

Q. Now, that's always in January? A. Yes, it is.

Q. And does each member have one vote? A. That's true, yes.

Q. Now, who elects the council? A. The council is elected by the total membership.

Q. And what was the year in which the membership elected you to council? A. Nineteen seventy-five.

Q. And how long did you serve on it? A. Well, I have been serving continuously since 1975, as a council member, as secretary-treasurer of the association, [651] and now as president. And as secretary-treasurer or president, you are a member of the council.

Q. So those weren't at the same time. You successively held the office of secretary-treasurer, and then became president? A. That's true.

Q. How many members on the council? A. Oh, twenty-two, including the secretary-treasurer and the president. I believe that's the figure.

Q. Now, Doctor Frank, during this period of time that you have been on the council and held these offices, has there been an activity in the N.C.A.A. to restructure the membership, or deal with the relationships among the members? A. Yes. This is an issue that has been under continuous discussion for many years. I think ever since I have been on the council, going back to 1975, and, of course, I remember specifically the proposals that were before the convention in 1978, and that was a very specific, meaningful proposal. However, it was defeated at that time.

[653] Q. Well, I think it might be well to come right on through on that, Doctor Frank. Tell me, if you know, was there a special convention then held in Saint Louis on December 3rd and 4th, 1981? A. Yes. And before I get to the special convention, I would like to indicate how the proposals came forth for the restructuring of division one A.

Q. Please do. A. In December of 1979, it might have been November of 1979, the council gave a great deal of thought and discussion to the entire reorganization of the N.C.A.A., not just with the restructuring of division one A. And so the council appointed a special committee on governance, organization, and services, to deal with not only the restructuring, but to look at the entire organization of N.C.A.A., how to accommodate the interests of women within the N.C.A.A., and certainly to see what we would do about restructuring of division one A football.

Of course, at that time, our attention was devoted almost entirely to the women's issue, but after the 1981 convention, then the council turned its attention to the restructuring of division one A. A subcommittee was appointed in order to

[654] deal with it, because we felt that our government would be rather cumbersome for the entire governance committee to deal with this important issue.

Q. What is the governance committee? A. The governance committee is the committee appointed by the council to look at the entire structure of the N.C.A.A., to examine its legislative processes; as I stated before, to see how women could be accommodated within the N.C.A.A., to look at a restructuring of division — the division, as well as to look at the district representation within the N.C.A.A.

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Q. Now, what did it do? What did it accomplish in this area? A. First of all, it did accomplish the goal of accommodating the interests of women within the N.C.A.A. [655] We looked at the district structure and made some changes there, but more importantly, it made recommendations to the full governance committee, as well as to the N.C.A.A. council, for the restructuring of division one A, which resulted in the calling of the special convention in December of 1981, and —

Q. We have been telling the Court a lot about restructuring, Doctor Frank. Does that simply mean changing the number of members, the qualifications, so that the number will change? Or is there more to it? A. No, I look upon restructuring as a much larger issue. But to be quite candid, the central, the overriding concern of a large segment of the N.C.A.A. was the reduction of the number of schools in division one A.

Q. What was the number before the 1981 convention? A. I believe approximately one hundred and thirty-nine members, and that has been reduced.

Q. And what is the number now? A. I quess between ninety to ninety-five, I'm not — maybe about ninety-two. I am not sure of the exact number.

Q. You said in your view, restructuring was a broader concept than the narrow one I have given you? A. Yes, broader in the sense that to include women within the N.C.A.A. as a part of our restructuring, to change the structure of the council, to do something about the [656] executive committee. I think all of this involves an examination of the entire N.C.A.A. structure, and so it's broader in the sense that we did more than just reduce the number of schools in division one A.

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[660] Q. Now, Doctor Frank, in exhibit D-two, would you state for the Court any other action taken? And you can look through and see, in regard to restructuring, in the broader sense that you have referred to? A. I do — without refinding it, resolution — let me see if this is it — yes.

I think resolution number ten, which is on page A dash nine, is a resolution offered by the council dealing with football television, and essentially that empowered the council to offer legislation at the January convention to reorganize and to make some changes in the football — television football program of the N.C.A.A.

Q. And what, generally, did it do? A. It empowered the council to approve specific legislation which was offered to the annual convention and voted upon.

Q. What year? A. January of '82.

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[662] Q. And are the three resolutions, forty-five, forty-six, and forty-seven, under that subject? A. Yes.

Q. And essentially, what did they do? A. Well, the first resolution, number forty-five, because [663] of the many questions about the official interpretation of the N.C.A.A. —

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A. And this resolution provided for review and approval of the N.C.A.A.'s council April 17th, 1981, interpretation regarding the association's control of all forms of televising of intercollegiate football games of member institutions during the traditional fall season.

I am reading from the intent.

A bit of background: that was an interpretation which was distributed by the council, and the council felt that this should be put before the entire membership for them to approve or to disapprove, the official interpretation of the council. And the members voted upon it and overwhelmingly passed it.

* * *

[668] Q. Doctor Frank, in order to identify that, I want to show you exhibit eighty-four, which is in evidence. And it's a letter from Mr. Hallock to you, I believe, of April 17th, 1981, requesting authority to disseminate a set of principles to the membership for a referendum vote. And I believe it contains the principles.

Would you look at exhibit eighty-four, please, and advise the Court what that is? A. This is a letter to me from the chairman of the [669] football television committee, Mr. Wiles Hallock, requesting from the council authority to conduct a mail referendum.

Q. Very well. Does it contain in it the principles as the television committee recommended them to you? A. Yes, it does.

Q. And there are fourteen, are there not? A. I believe so.

Q. And they deal with matters like the number of appearances per team in a certain period of time, and the two-network concept, and the term of the contracts, and all that, don't they? A. That's true.

Q. Now, is that set of principles acted on by anyone before it is submitted to the membership for vote? Does the council consider it? A. Yes, they do, yes.

Q. And did they in this case? A. Yes.

Q. And then what was the result of the referendum mail vote by the members? A. Again, the membership overwhelmingly approved the principles submitted to them.

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[670] Q. Now, Doctor, at the time that the council approved the referendum in April, 1981, were you advised of activities by the College Football Association in connection with the upcoming T.V. plan and television contract? [671] A. Yes. The council is aware of activities by the College Football Association.

Q. And how did you learn of it, and what did you learn? A. My recollection is that I know, or at least was brought to my attention, was, I believe, a letter, or a memorandum from the College Football Association to its members, asking them to abstain from — from voting on the principles which had been — which were — subsequently would have been submitted to the N.C.A.A. membership for a vote.

Q. And is that the first thing you learned about the C.F.A. not being in accord with these principles? A. I believe so, except for informal conversations with members of the N.C.A.A., as well as the C.F.A., indicating there may be displeasure about the whole television plan of the N.C.A.A.

Q. Now, did there come a time, then, when the council adopted an official position on that? A. Yes.

Q. And was that precipitated by the act of the C.F.A. in abstaining? A. Yes, it was.

Q. Tell the Court about that. A. Because of the request by the C.F.A. to its members the council felt it necessary to

issue an official [672] interpretation regarding football matters, and certainly to indicate to the membership, or educate the membership what an abstention meant on the television football principles. And that, in essence, was the reason for the official interpretation of the N.C.A.A. council.

Q. And would you look at exhibit two, which is in evidence, Doctor Frank, and state whether that is a copy of the official interpretation? A. Yes, this is the official interpretation.

Q. What dissemination of that was made, sir? A. To the entire membership of the N.C.A.A.

Q. Doctor, did there then develop a running controversy over this matter of the principles and how the contract for the upcoming television, beginning in 1982, would be handled? A. I would say "yes," controversy did develop.

Q. And it's led us to here, has it not? A. That's true.

Q. Now, just outline for the Court, if you will, the highlights of the events as you were involved in them? A. Well, not to duplicate, but I just mentioned how the official interpretation, you know, came about, and I am not sure of the exact dates, but I do know that when the announcement that the College Football Association was going to sign a contract with—with N.B.C., it certainly caused some concern with them, within N.C.A.A. circles.

[673] I believe that first I knew about it, or heard about it, the N.C.A.A. council was meeting out in Oregon, which would have been August, you know, of last year. And as a result of this action by the C.F.A., then the C.F.A. — the membership had to talk about the official interpretation, and I guess a lot of letters started to be written to distribute to the membership of both organizations regarding T.V. matters.

Q. Did you learn in the early part of 1981, that C.F.A. had its annual meeting and rejected your official interpretation and decided they would proceed on their own? A. I did learn about that.

Q. Now, was one of those letters — let me hand you exhibit seventy-one, dated June 23rd, 1981, and ask you if that's one of the letters that you have referred to? A. Yes, it is.

Q. And just tell the Court the occasion and purpose of that letter? A. Yes. The — this was a letter that was sent out over my signature, and it explained essentially the position of the N.C.A.A. regarding the stated intent of the C.F.A. to sign a contract with N.B.C.

It also reaffirmed the official interpretation that had been issued by the N.C.A.A. council back in April.

Q. It was a summary of your position and the council's? A. Yes.

[674] Q. And it went to all the chief executive officers of N.C.A.A.? A. Yes, that's true.

Q. I take it you didn't attend any actual C.F.A. meetings or have any specific dealings with C.F.A. personnel, yourself? A. No, no meetings. Of course, I talked to C.F.A. personnel, chief executive officers.

Q. When did you do that? A. Throughout the summer, quite a few.

Q. You had been getting calls from them? A. Yes. And there were many, many discussions, mostly by telephone. And, of course, there are C.F.A. members that are members of the N.C.A.A. council, and the governance committee, so I had occasion to — I think the steering committee met last June and had discussions with C.F.A. members at that time.

The council met last August, and C.F.A. members on the executive committee, as well as on the council. We had these kinds of discussions.

Q. So in the occasion of your regular N.C.A.A. business, you came in direct contact with the C.F.A. representatives, and naturally these matters were evolved? A. That's true.

Q. What essentially was said between you? [675] A. Well, it's back in June, again, when the steering committee met, and we considered the official interpretation. There was give and take on both sides. I would say that members of the C.F.A. expressed a point of view, other members, you know, had their version or had points of view. It was this kind of discussion. And, obviously, we were talking about the official position of the C.F.A. versus the N.C.A.A.'s position, and it all evolved around two issues, reorganization and television matters.

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[679] Now, Doctor Frank, at any time during this period we [680] are talking about, let's say from August up through the — say earlier, in June of '81, through the special convention in December, did you threaten or coerce any of the C.F.A. members? A. Absolutely not. Under no circumstances would I do that.

Q. Do you know of anyone else at N.C.A.A. who did so? A. No, I don't.

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[681] Q. Did you state to C.F.A. members in these discussions in the summer what the consequences of their going forward with the C.F.A. contract with N.B.C. would be? A. You know, questions were asked, if they signed a contract with N.B.C., what would be the consequences, what position would N.C.A.A. take.

And my, you know, response generally was that it appears to be in violation of the legislation of the association, and any member that is in violation of the legislation is subject to the enforcement proceedings of the N.C.A.A.

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[682] Q. How has the football television plan tied into the educational objectives of N.C.A.A.? A. Well, I go back to what I know about the history [683] of the N.C.A.A.'s involvement and control of the televising of football. And it was started because the membership felt that it was necessary to exercise control over the televising of football.

Essentially, the television plan that has been approved by the N.C.A.A. serves a number of purposes.

Number one, I believe it serves to educate the general public about the place of college football within the total educational enterprise.

I think, secondly, the N.C.A.A. has attempted to spread the benefits of college football — that is, television — to as many members as is practicable.

Thirdly, I believe that it has served to project a very favorable image of college football throughout the nation.

And I believe those are some of the — those have been the objectives, and I believe they have been accomplished as a result of the N.C.A.A.'s involvement in the control of college football, televising college football.

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[684] Q. Now, are the members of the council separate from the staff? A. Yes, they are.

Q. Now, where do the council members come from? A. Well, the council members are elected by the membership of the association, and based upon the—based upon the division representation, geographical representation, they come from all over the United States.

Q. But are they — who are they? A. They are—the council consists of members — the representatives from the member institutions. And to [685] be a council member, you have to be the president or chief executive officer, or you have to be the faculty representative, usually elected by the faculty

members at the institution, and athletic director from a member nstitution or the feed mill, who is in charge of the womens program or has a major administrative responsibility within intercollegiate athletic programs.

So all the council members are from the member institutions.

Q. Are they paid anything for their service? A. No, they are not.

Q. You have not been compensated during the time of your service over these several years? A. No.

Q. What is the relationship in connection with policy between the council and the staff? A. Well, the council's responsibility is to establish and to formulate policy. And the staff's responsibility is to carry out the policies of the N.C.A.A. council.

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[686] *Cross Examination by Mr. Muchmore:*

Q. You had occasion, then, Doctor Frank, to speak with a number of the schools, the heads of the schools who were contemplating whether or not to join in the N.B.C. contract during the time they were making the decision? A. Yes, I did.

Q. And in the course of that, there was a discussion with them as to whether they would be in violation of N.C.A.A. regulations or rules, is that correct? A. That would be a part of the discussion that I had with the chief executive officers.

Q. And you would inform them that, in your opinion, if they went along with that contract, they would, in fact, be in violation? A. At one time I did, yes.

Q. And you also informed them that if they were to go along with a contract with another network, then you would anticipate that an official inquiry would be made and enforcement procedures would begin? A. I have indicated that, yes.

Q. Did you indicate to them what the results of the enforcement procedures might be? A. No, I did not.

[687] Q. Were you aware at that time that there were articles appearing in the newspaper, which N.C.A.A. officials were being quoted as saying that these sanctions could go so far as expulsion from the N.C.A.A? A. I read some articles like that. I don't recall any N.C.A.A. official saying it. I certainly did not indicate to anybody what the results would be, because I would not know.

Q. But my question was that the results could be up to expulsion, and that's a true statement, is it not? A. I believe so, yes.

Q. And it is true that right about this same time, you were meeting on the council, and you were deciding that such investigation should proceed promptly if you determined that these violations were apparent? A. Well, there was discussion on the council as to when investigation or inquiry would begin. I do remember specifically a discussion as to whether or not a violation occurred when a school gave an intention of signing with N.B.C., or whether it would begin when the school actually signed with — not signed with N.B.C., but contracted for a game with N.B.C.

So those are the kinds of discussions that took place, and certainly at that time, members said that whenever this determination was made, official inquiry could be made, and [638] that is the beginning of the enforcement procedures.

Q. Yes, sir. My question is, do you not, on the council, decide that — when you determined that the violation had occurred, that the proceedings should begin promptly? A. I am not sure that was an official action of the council.

Q. My question was, was it not discussed on the council, that should take place? A. It was discussed on the council, yes, sir.

Q. Now, what exactly was it that you were informing these N.C.A.A. members that they would be in violation of? A. They would be in violation of the N.C.A.A. legislation.

Q. All right. Which legislation were you informing — A. In this case, it would be the principles which had been voted upon by the membership.

Q. Are you referring — A. And —

Q. Go ahead. A. That's all, I am finished.

Q. When you say the "principles," are you referring to the principles of negotiation which were submitted, and which were made an exhibit here and referred to a little earlier, from the television committee? A. Yes, I am.

[689] Q. And that the membership approved? A. Yes, I am.

Q. And it is your position that these principles of negotiation constitute legislation, the violation of which would subject a member of the N.C.A.A. to enforcement proceedings with sanctions which could result with anything up to expulsion from the N.C.A.A.? A. Yes. The principles come under the category of "other legislation," which is referred to — not sure, in the bylaws or in the constitution.

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Q. All right. The reference was made consistently, was it not, to article four, section two-A of the constitution? A. Yes, conditions and obligations of membership.

Q. And when these members were informed that they would be in violation, the reference was made to four, two-A, was it not? A. That's right.

Q. And that reads, "Conditions and obligations of [690] membership. The members of this association agree to administer their athletic programs in accordance with the constitution, the bylaws, and other regulations of this association."

And it is your understanding that the term, "other legislation of the association" was — meant the principles of negotiation that have been introduced into evidence here? A. That's true, yes.

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[691] Q. And you are referring to your letter to the chief executive officers on the behalf of the council, dated June 23rd, 1981? A. Yes, I am. Again, I would like to see it again, but right now, that's my reaction, that that would answer your question in terms of "other legislation."

And also the official interpretation of the council.

* * *

[694] Q. The problem is, or the perceived problem is that if we have too many games on television, that that's going to be a problem for live attendance, is that right? A. It's when those games are televised that it would be a problem for live attendance.

Q. Now, that problem can be avoided, if that problem exists, by any rule that limits the amount of live television in the manner that the N.C.A.A. thinks it ought to be limited, right? A. A rule would be necessary in order to limit the number of games, yes.

Q. But wouldn't a rule which provided the number of times you shall be on television, is limited, but you can sell your rights to be on television that number of times, to whomever you want, for whatever price you want; wouldn't that accomplish the same result? A. I don't think so. I don't think just having a rule limiting the number of games on T.V. would accomplish the same result.

I believe that it's absolutely necessary for an association to be able to exercise some control. I think there must be some

enforcement procedures, simply because if you just had the rule, alone, then I think you would have quite a few abuses, and you would have to have some kind of control.

In answer to the — maybe the first part of your question, [695] it doesn't necessarily have to be the N.C.A.A., but I believe there has got to be some organization in order to do this.

Q. There's got to be some organization telling the school how often they can be on T.V., or do you mean there has to be some organization which sells their rights for them? A. Well, both, really.

Q. I want to know why it is not sufficient to have an organization such as the N.C.A.A. telling them how often they can be on television? You can be on television exactly the number of times provided under last year's plan, except that this year you can sell your own rights. Why isn't that sufficient?

Why wouldn't that be sufficient to protect live attendance?

A. Well, I just stated, and you are just confining it to the number of appearances, but I think the television plan certainly is more complex, involves more than just the number of times that a school can appear on television. And I think as a result of that, it is very important that there again be some association or some group or some body that would be necessary in order to monitor, as we do now, all of the matters that go into teams appearing on television.

Q. I am not sure that I understand what you mean by "monitor all the matters that go into the teams being on television." [696] A. Well, I do know that we have members of the television committee that are in constant contact with the network to make sure there is compliance with all — you know, the stipulations in the contract.

I know there are many things that go into making up the contract with the network, and I think they are on the phone constantly. They are having conference calls and so forth.

The point I am making here is that it is more than just a matter of having a rule limiting the number of times a school can appear on television. It is just more complex than that.

Q. It is also a matter of enforcing that rule? A. If there are violations, yes.

Q. And your concern is that that rule cannot be enforced unless it is the N.C.A.A. that is making the sales of the contract? A. Well, I said it does not necessarily have to be the N.C.A.A. It could be some other organization, but as long as you are a member of the N.C.A.A. and this organization has certain rules and regulations governing the televising of football games, then a school is obligated to comply and to abide by those regulations.

Q. What I am asking, are you saying that if you allow the school to sell their own rights, but tell them how many times [697] they can be on T.V., and when, if you like, that that's not enforceable? A. I don't understand that question.

Q. Is the point you are making that if you let these schools sell their own rights, their own price, that we can't enforce that? Is that the point you are making? A. Well, you are talking about the awarding of rights, and it is my understanding that the schools, right now — no, not my understanding — I know that they can negotiate their own price with the network. The only thing that the N.C.A.A. is doing, of course, is agreeing on the minimum aggregate price with the network, and the school is free to negotiate with the networks for the games that are going to be televised.

Q. What if we tell the school, "Here's 'X' number of times you can be on television." A. Yes.

Q. "And here's when you can be on, whichever network you like."

Why wouldn't that protect gate attendance? A. Counselor, I think I have already answered that, and I would just only be repeating myself.

Q. I don't want — A. And saying the same thing.

Q. I don't want to ask you to repeat yourself. [698] All right, sir.

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[715] **WALTER BYERS**

was called as witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Mr. Byers, would you please state your name and address? A. Walter Byers, 8424 Fontana, Prairie View, Kansas.

Q. What is your occupation? A. Executive director of the N.C.A.A.

[716] Q. How long have you been executive director of the N.C.A.A.? A. Approximately thirty years.

Q. And were you the first executive director or did you succeed someone else? A. No, I was first executive director.

* * *

[720] Q. So from the beginning, was N.C.A.A.'s original and first action in the area of regulation and control? A. Yes, it was and particular pointed toward football.

Q. Now, could you describe for the Court, then, the evolution of the N.C.A.A. rules? A. Well, as I mentioned a moment ago, after World War II, several things had taken place which moved intercollegiate competition from essentially a regional activity to a national activity. I think probably the first that occurred before the war were the national radio broadcasts by a number of outstanding commentators of intercollegiate football games that spread the reputation of different institutions across the country for the first time.

But shortly after World War II, of course, came the advent of television in the early — well, late 1940's and early Fifties and, of course, the course of the airplane became perfected and we moved from the DC-3's that were eventually regional in their capacity, to the jet props and the jet airplanes that shrunk the continent, as far as recruiting athletes was concerned, it was one of the most significant developments, along with the television for recruitment of athletes that ever occurred in intercollegiates, because it made possible [721] institutions with great projects, athletically speaking, to recruit nationally and could get a prospect to come visit their campus in a couple of three hours and get him back home for Christmas, and those types of things.

So once the — once the air service became perfected and the national radio and national television broadcasting spread the representation of colleges athletically to all corners of the country, we had national problems, we had national recruiting problems that had never really come into focus before, and we had other competitive factors in excessive scheduling and matters of that area.

So it was in the early 1950's that the N.C.A.A. first began legislating what I would call in-season type of rules.

An example, I believe, in 1951, the — we restricted spring practice so that you didn't spend too many days in spring football practice, and within a year or so, they limited the number of football games that a college could play. The first limit, I think, came in 1952 or '53, and limited ten games of intercollegiate football scheduling, and subsequently it's been raised to eleven. They limited them shortly thereafter, almost simultaneously, the number of preseason days that you could spend in practice, so that they didn't bring the students back too early from their summer jobs and didn't start them practicing too early in the fall and too far ahead of the start of classes.

[722] I guess my central point is that because the faculties that I have spoken to, the N.C.A.A. then emerged into a body to

which the colleges turned as they encountered these problems and legislated nationally in areas that caused the colleges concern.

I just say one other thing, if I may, sir, and that is that the history of the N.C.A.A. will show that most of its legislation has been brought about by the — by the sport of football. Secondly, it would be basketball. I would like to speak just for a brief second — brief minute, if I may, on why that's so.

Intercollegiate football is essentially a game of participants, it involves a great deal of athletes, it involves, of all sports, the greatest number of participants in college, and it arouses a spirit among alumni and followers that generate high enthusiasm like no other college sport we have, and with that enthusiasm comes the intensity of competition and intensity to win, and I'm sure you are familiar, sir, with the rivalries in your state and interstate rivalries that almost border on border warfare when Oklahoma plays Texas. It's those kind of rivalries that generate the enthusiasm which tends to lead to abuses which causes the enactment of many of the rules that we have.

Q. Now, Mr. Byers, could you put that in perspective and tell the Court how many sports does the N.C.A.A. act in, [723] approximately? A. I believe we involve ourselves in approximately twenty sports.

Q. And does that include both rules and championships? A. Yes, sir — well, one or the other or both.

Q. Now, you have been here throughout the trial, have you not? A. Yes, sir.

Q. From the beginning? A. Yes, sir.

Q. And you have heard the testimony about the analogy between the football television and basketball nontelevision by the N.C.A.A. Would you explain the reasons for that? A. Well, it's like when you try to compare and infer that the

policies applying to basketball should be the same as those applying to football or vice versa, it's somewhat like — well, it's like trying to compare the highly televised proportion ought to be the same as a soccer match in Yankee Stadium, jai alai in Miami ought to be the same.

There is no similarity because — except they are sports. Football television, you were speaking to the rules applying to television?

Q. I was. A. The need for football television was brought to the front because, I think, of three essential factors. One, [724] there was evidence then and there is evidence now that unrestricted television of football adversely affects in-stadium attendance. There was then and there is now the concern that if — unless college football is limited and controlled, there is going to be a very narrow T.V. aristocracy that will dominate not only television, but resources of recruiting that you get with television will dominate the sport, itself, and it was necessary to spread this remarkable medium and reward — among as broad a base of institutions as we can, and thirdly, not only to exposure and recruiting advantages of the institutions again, but there is need to spread financial resources, but at the same time give the public a good football game to watch.

You find no similarities for that need in basketball for a number of reasons.

Basketball generally and there are a few exceptions, will be playing in field houses of fifteen thousand or under, football stadiums, when you talk about one-A your're talking about football stadiums running twenty-five thousand up to over a hundred thousand at the University of Michigan. You're talking about a field house in basketball in which the spectators are almost a part of the game, they are close, they are near the floor, they can participate in it and almost every seat is an excellent seat, and the larger stadium in football you will say that probably thirty to forty percent of the seats [725] in most

of the stadiums in the country will be behind the goal lines, so you have marginal seats that you have to sell in football which is not the same that you have to do in basketball.

In basketball, your student bodies — at the University of Illinois, the students have to rotate in going to the game. They get a chance to go to every fourth game because the student body is so large, if they all went to the same game, there wouldn't be any tickets to sell to the normal spectator, so you have those kind of considerations, but I think on top of all of that, you have to realize that ninety-five — over ninety-five percent of college football is played on Saturday because of the nature of the game, because of the amount of number of students it involved in following the teams, games are scheduled ninety-five percent on Saturday. That's when all the college football television is concentrated, so in controlling football, you are televising against the mass of your institutions.

In basketball, most all the basketball television occurs on Sunday afternoons and Saturday afternoons where hardly any colleges play basketball. The teams that are being televised, of course, play basketball. But most all of the basketball scheduling is done on Friday night, Saturday night, Tuesday night, Monday night, so even though there is extensive college football televised, most of the national televising, the network televising, is done on — on afternoons when there is [726] very little conflict with the games.

So I just say, sir, that for all those reasons, I see no comparability at all to try to equate the unrestricted televising of basketball, to some type of argument that there shouldn't be television controls in football, because I just don't think the situations are at all comparable, and I suppose the overriding evidence of that is that the membership of the N.C.A.A. have never proposed that we should have controls in basketball, but we don't institute controls by some bureaucratic decision. The membership has to enact these things, and if they don't feel they are needed, they don't enact them.

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[740] Q. Mr. Byers, you also heard testimony in this courtroom about whether members of the N.C.A.A. could effectively withdraw and have their own association, have you not? A. Yes, sir.

Q. Would you state in your judgment, based on your experience, whether that's a feasible thing to do? A. For one institution?

Q. Take it that way, first. A. One institution would have difficulty in withdrawing and functioning in the sports of football and basketball. I [741] happen to think it could conduct quite a viable program in other sports, but one institution, unless it's persuaded its conference members and others combine, it would have difficulty in conducting what you might construe to be a major football goal.

Q. Is there a viable level at which you think a group of members could withdraw? A. Yes, I think — I think ten members, if they were the prominent members, could easily function and pursue a highly successful football and basketball operation. I think twenty properly distributed, east and west, could be able to function highly effectively and realize substantial financial rewards in both sports.

Q. You think the members of the C.F.A. are a coherent and viable group in that regard? A. The sixty-one members of the C.F.A.?

Q. Yes. A. Yes, they could obviously function, if they choose to do that.

Q. There is some evidence, Mr. Byers, as exhibit GP, an outline that Mr. Neinas testified was drawn up by him in November of 1981, for a university sports association. Is that the type of thing that a person would do if he were setting up an organization parallel to the N.C.A.A.? A. Well, it's obviously a proposed structure for a [742] national organization to

administer sports and enforce the rules, conduct championship competition, so I assume it's a draft program for such an organization to function within itself.

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[763] Q. Mr. Byers, we were about to turn to the origin, history, and purpose of the N.C.A.A. television plan.

Had there been — you came in 1958, as executive director, is that correct? A. Nineteen fifty-one.

Q. Nineteen fifty-one? A. On a full-time basis, yes, sir.

Q. And in 1951, did you learn there had been some action in this regard to football television before your arrival? A. Let me explain. I have been part-time assistant in the N.C.A.A. office from 1948, I believe, to 1951, and then became full-time executive director in 1951.

Q. So to whom did you report to in that earlier period? A. Well, Kenneth "Tug" Wilson, who is commissioner of the Big Ten Conference, was also secretary-treasurer of the N.C.A.A. on — that was a part-time position, too, as far as the N.C.A.A. was concerned. And I worked for Mr. Wilson, as far as the N.C.A.A. structure was concerned.

Q. So were you familiar with some activities of N.C.A.A. in regard to college football television before you became executive director? A. Yes, sir.

[764] Q. And what was the status — what happened? A. Well, television had just begun to flower in the east, and some educational institutions in the east, primarily Pennsylvania, were beginning to televise their games. This was totally new. And Dumont network out of Philadelphia, not a network as we know it now, but Dumont was doing those games, and there was some consternation expressed among other colleges in the area about this new development.

So the eastern institutions urged that the N.C.A.A. begin some kind of study, and there were discussions from, oh, '47 up through '50, at our annual conventions, about the need — about this growing phenomenon and the fact that the colleges, as far as athletics were concerned, were going to have to learn to live with this, because it had an impact, obviously a substantial future impact.

So after those several years of discussion, and at the 1950 convention — no, 1951, a resolution was adopted to declare a moratorium on any television. And we ran an experimental program, it's my memory, in 1951.

And in the interim, we had a television committee appointed, Your Honor, and they were functioning during these discussion periods, those discussion years.

But the committee had gotten authority, also, to hire a well-known, reputable research outfit from the University of Chicago, known as the "National Opinion Research Center," [765] I believe it is, N.O.R.C.

So to go back, the convention voted a moratorium on any football television, and set up an experimental program so that some games weren't televised and had no television competition in the area; other games were subject to television on a nearby game. There was cross-regionalization games.

In any event, a research pattern was set up to enable N.O.R.C. to measure the effects of television upon gate attendance, in-person attendance.

I believe — and I want to check a note on that — just a point of reference — in 1951, there were ten million five hundred thousand television households. And that compares, for example today, I think, in January of this year, there's something like eighty-three million one hundred thousand television households. I just draw that comparison to see the

type of emerging industry we were looking at, and the number of T.V. households that were being measured as to effect of attendance.

After that study — N.O.R.C., incidentally, was employed, I believe, for six or seven years, to continue to monitor this growth of television and the effect of the N.C.A.A. television policies.

So after the 1951 experimental year, and I think I have that year correct, in 1952, the convention was faced with a decision of whether to vote to control football television [766] based on the evidence at hand at that time. The convention did vote to control television, and the first few plans were quite restrictive because, obviously, the membership was feeling its way as to how do you use television as it develops to promote sports; but at the same time use it wisely so it doesn't hurt in-person attendance?

The first plan, as I recall, permitted only one appearance by a team, a year. And I believe provided for only twelve telecasts. I think you could only have one game televised a week nationally, each of twelve Saturdays, and only one team could appear one time per year.

As we evolved through the years, those plans have generally been loosened. By that, I mean — let me make this comment first. The attendance — football suddenly started to decline with the emergence of television, which led to the concern that I spoke about, and decision to control it.

But as they put in the control program, that attendance dip turned back upwards. Through the years, as the plans have evolved, the committees have recommended, and the membership has approved, more liberal plans. They loosened up the team appearance rules so you could have more than one appearance per year, and loosened up the number of games televised. Instead of just twelve single games, one each Saturday, we went into a national regional combination. And [767]

it's interesting that the pattern of national regional first emerged in the mid Fifties or late Fifties, I am not precise on this, as a best way of approaching this. And we have used that format ever since.

And I know, Your Honor, you are familiar now with the two-network concept, and the different national-regional patterns with that, and the agreement games provided now through this contract and supplementary series.

But I guess the central point I am trying to emphasize is that this has been an emerging plan, carefully studied and liberalized to provide more television, as long as our attendance keeps going up. That has been our chart. If we can live with continued growth and attendance at college football, and still maximize appearances and get the revenue there to help the sports program, that's the best way to handle this problem. And it's been very successful.

Of course, one of the fascinating questions—I may be out of order by saying remarks too far —

Q. Let me ask you a question, Mr. Byers. What is the importance of the gate attendance in this business? A. Well, gate attendance is fundamental to the financing of the program. If you — well, that speaks for itself, I assume.

Q. I think you better elaborate for the record, so we all understand it. A. [768] Well, gate attendance is obviously the foundation of financing programs. It has been the historical base on which you finance a program, in part or in whole. You obviously want to generate as many dollars at the gate to cut any subsidy that you have to devote to athletics from other educational funds. I mean, the more money you can generate at the gate on behalf of athletics, the less money you have to draw from the other budgets or state legislature to balance the athletic books.

And traditionally, the gate attendance has been the foundation of athletics.

Another factor when you measure this, maybe you like to stage fights out of Caesar's Palace out of Las Vegas, which are strictly television shows. But the romance of college football is the crowded stadium, the cheerleaders, students, and everybody being enthusiastic about a game. And we certainly don't want to end up with a studio sport for college football, because that's the heartbeat of what we have that makes this whole thing so exciting.

Q. So is it normal, and has it been throughout, for colleges and universities to sell tickets to generate sufficient revenue to be an important way of financing their athletic program? A. Certainly.

Q. Now, would you tell — [769] A. Mr. Harry, may I relate on the attendance, in order — I would like to put some attendance statistics in as to what these different class A teams draw, so we can understand what the gate is we are talking about. Would that be appropriate?

Q. Please.

THE COURT: Well, it's up to Mr. Harry.

Q. Yes, I would like that, Mr. Byers. A. I thought you might be interested in this. When you take the football divisions — let me come around differently.

There are six hundred and forty-eight four-year institutions conducting intercollegiate football in the United States, in 1981.

The total attendance, paid attendance that they — I may have to hedge that, I am not sure that's all paid attendance. Some of this may be straight gate count, in which some complimentary tickets may be included. So let me qualify it to that extent.

But the attendance as recorded at the institutions total thirty-five million eight hundred seven thousand forty people.

Now, there are four hundred and ninety-six institutions of the N.C.A.A. — these are the four-year, degree-granting, regionally accredited institutions — four hundred ninety-six members sponsoring college football. There are obviously [770] institutions that don't choose to belong to the N.C.A.A., or don't qualify.

Now, go to one A; there are approximately ninety-seven institutions, and they average attendance of thirty-four thousand six hundred twenty-one people.

One double A has ninety institutions, and they average ten thousand nine hundred twenty-seven people.

And division two, there are a hundred and twenty-one institutions, they average four thousand six hundred twenty-nine.

And division three, there's a hundred and eighty-eight, and they average two thousand two hundred thirty-eight spectators.

Now, I just submit that in remarking on your earlier question, Mr. Harry, that no — that gate attendance is important. Maybe thirty-six thousand doesn't compare favorably of the sell-out status of Oklahoma, but there's only two, three, or four institutions that have a sell-out stature of Oklahoma. And the dollars, at whatever level, are extremely important to the programs you are trying to finance.

Q. Give the illustration with Michigan, if you will. A. Well, the University of Michigan, which is the attendance leader in college football, sold out every game, hundred and three, hundred and four thousand spectators; of course, has a substantial income.

[771] Interestingly enough, Michigan is very much in favor of television controls. Michigan does not, because of its huge stadium and number of seats, marginal seats —

Mr. Coats: If the Court please, I object to that, whether it's favored or not. It's immaterial.

THE COURT: Sustained.

Q. Do you know the average price of tickets in the one A games now? A. I would imagine the average would run eight, nine dollars.

Q. Now, Mr. Byers, since the television controls were instituted in the early 1950's what has been the difference between gate attendance then, and gate attendance now at college football games? A. It has steadily increased each year since the early Fifties. I forget when that dip occurred, but it started back up and has continually climbed since that time.

Q. And is there a ratio you could apply comparing the present to the early Fifties? A. I am not sure what you mean, ratio.

Q. How much has it increased? I don't mean in — A. I don't have that —

Q. All right. A. — in my head, Mr. Harry.

Q. That's all right. [772] A. It's been a steady three or four, five percent a year increase.

Q. Thank you.

Now, has the association, the N.C.A.A., continued after these organizational controls to consider the matter of the effect of college football television on game attendance? A. Yes, sir.

Q. In what way? A. Well, as I suggested, the N.O.R.C. study, I believe, for six or seven years, up through '57, and even in that time and subsequently for each plan, the television committee has held, invited — held hearings and invited members to address it as to what they wanted the plan, the next plan to be; these traditionally were in two-year sequences. I believe at the start we may have only gone a year at a time. Then in the mid Fifties or so, I believe we went into a two-year

sequence, so the plan was short-term, to try to keep it current and adjust them to the goals of the television industry, and to the effect it had on college football attendance.

But the committee would regularly hold hearings. It took questionnaires — undertook questionnaires of the membership, as has been discussed previously, as concerning 1977, I believe.

Q. Those are not in evidence. [773] A. Excuse me. Well, regularly took questionnaires of the membership to see what they wanted, and proceeded in that manner to try to meet the membership's needs.

Q. And have you, yourself, paid attention to the effect of television on gate attendance throughout the years? A. Oh, yes, sir. That's one of our jobs in our office, is to gather those statistics and look at television ratings. We chart that all the time, to — you have to approach this issue from the standpoint, is there an infinite audience with college football? Is there an infinite audience?

It is clear if you look at the ratings, and I won't bore you with that at this point, or if you look at the attendance, there is not an infinite audience of people to either watch college football on T.V. or go to the stadium. Yet, there's a group, and a big group, that likes college football.

Well, you have to — if you are going to increase your ratings and increase the number of households that are watching television, from the present, well, an eleven rating runs you about nine million households, and you would suddenly turn television loose and run that rating up to take twenty-five million households, as an extreme, you simply have to realize you are taking some people away from going to a game, to stay home to get your T.V. ratings up.

You can't have high T.V. ratings and high attendance. [774] assuming you are bringing in a whole new audience of supports of college football. The history simply does not support that type of rationale.

So — I wandered a bit from my point that we continually compare attendance to ratings, to plan and work and see where we should go with this T.V. plan, or future plans as these evolve.

* * *

[795] Q. Mr. Byers, the testimony is that there has been a limitation on appearances of one college football team onto the national television contract over the years. You said already it started out as a team can only be on once a season, in the early days — A. Yes, sir.

Q. — of the plan. Now it can be on how many times? [796] A. It can be on six times.

Q. In two years? A. That's correct.

Q. All right. Now, what is the reason for limit — for limiting appearances? A. Well, there are historic reasons, and they are as valid today as when starting out. The first concern, back in the Fifties, was the very real one in that research showed, and personal experience showed — personal experience in the form of respective institutions — that television would have an adverse impact upon gate attendance. That was the motivation for the membership adopting football television rules.

Secondly, and very early in all of these reports in the Fifties, you will find a very grave concern that unless there is some spreading of opportunity here, the T.V. aristocracy of four, five, or six teams will monopolize television today and tomorrow. And that has been a consistent concern among — through all these years, up to the present time.

Sure, there are traditionally strong teams, even under the present system, but it would vastly narrow, if you did not have some rules that would spread these appearances among institutions conducting major programs.

Q. Who selects the games? [797] A. The networks.

Q. And on what basis? A. They select it on the basis of the appearance rules. They have to adhere to the requirements of the plan in the selection of the games, but the selection of the games, themselves, rests in the networks' hands.

Q. What do they want? What do they select? A. Well, they select the best games they can get under the ground rules, the best they can get under the plan and ground rules.

Q. Now, has the committee, with you participating, considered over the years the consequences of not having any appearance limitation? A. Oh, yes. That's regularly — that's regularly discussed, and surveyed by the committee, by mail and by personal appearances.

The fundamental question is, "Do you want to loosen up appearances and have more opportunities for major teams to get on, the ones that are getting the maximum" — and there are only a handful of teams that get the maximum now — "do you want to take all controls off?"

Those questions are opened up each time you get into a plan.

Q. What has been the thinking of the committee on removal of all controls? [798] A. They have been unanimously against it, based on the evidence at hand.

Q. Why? A. Because of the reasons I said. It would have a disastrous impact upon television's judgment, and I concur with that, and it would turn over to the few powerful teams the maximum rewards that will accrue them from television.

Q. Has a committee — A. You must bear in mind, Counselor, there are only about ten or fifteen super premium games in college football.

Q. You mean in what period of time? A. In one year. You only have maybe ten really strong games that are block-

busters. Everybody else, there's a whole myriad of other games, you see, and if you don't have some program here to spread these opportunities, you are going to have this television concentrated on these premier games, very high money, and very low money for the balance of the games available.

An appearance rule, I suggest, is critical to spreading these T.V. opportunities among the vast majority of the division one A games and teams.

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[800] Q. Now, has the committee, over the years, television committee of the N.C.A.A., considered whether its plan that it's recommending and the members ultimately adopt, could the objective be accomplished by having less restriction than it actually embodies? A. I'm sorry, I am not clear on the question.

Q. Let me ask that again, sir.

Does the committee evaluate the area of extended restriction and consider the need for restrictions in making up the plan? A. Yes, sir. I thought I responded that it does, that each time it gets into the preparation of a new plan as to — as to whether we should have the same restriction, less restriction, or more, for the future.

Q. Fine. Now, as to the present plan, that's exhibit LT, do you believe there are any less restrictive controls that would accomplish you purposes? A. You are talking about the '82-85 plan?

Q. Yes, I am. A. The thing is, the '82-85 plan is a very studied, well-thought-out plan, to expand the amount of college football television, which has expanded dramatically with two conventional networks plus a new entire cable series. It's an expansion, and it's very carefully thought out to see whether this expansion will hurt attendance.

[801] The point of the committee is that if, in this really major adjustment in providing more college football television than has ever been available before, the committee hopes that attendance will not decline. And if the attendance keeps on the upward path that it has been, then, clearly, the committee will, of course, be delighted about the results of the plan and will undoubtedly consider further loosening in the next deliberations.

* * *

[811] Q. Now, what is the importance to an institution as of this coming season, let's say in the past season, to getting its game on television? What does it mean to an institution to be on N.C.A.A. television? A. Well, this may seem somewhat ironical — if that's the right term for it — but a great many division one A institutions value the exposure in the television almost as much as the money, if not more.

Q. Why? A. For two reasons: television exposure helps the first part — the party of the first interest is the head football coach, because he's recruiting, and he wants his institution known and identified to the high school prospects in the area where he is recuriting.

If he walks in, the prospect doesn't even know his institution, where it is, or hasn't seen it on television, he automatically is coming in a step behind the coach who has [812] frequent T.V. appearances.

So the first party is going to be the head football coach.

Another party of interest is the president. He wants his institution exposed because we are at a point now of where the great baby boom is passed through higher educational institutions, and if you look at all the charts, enrollments have peaked or slightly turned down.

Exposure to prospective students, to high school counselors, or whatever, by institutions — the institution named, plus the — in each telecast there is a segment devoted to the

institution, itself. It's an educational message in behalf of the participating teams. So he values a great deal the exposure of his institution as an educational agency to the areas in which he hopes to attract students.

Q. Thank you.

Now, would you tell the Court, Mr. Byers, generally what the history — without going through all the details, but what the rights fees were when you first started with your committee negotiating network contracts, and what they are now?

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[813] A. In 1952 — may I answer it this way? And if you need the figures, I can get them out of my briefcase, but in the period of 1952 to 1962, in other words, the rights that were paid in '52, when you take them to '62, represented three hundred and forty-six percent increase.

The rights from 1962 to 1972, the next ten-year segment, represents a hundred and sixty-four percent increase.

And the minimum rights contemplated in 1982, when you take that span of 1972 to 1982, it's a three hundred and ninety-two percent increase.

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[816] Q. I want to make that clear. All the membership of C.F.A. institutions, colleges and universities, are also members of the N.C.A.A., aren't they? A. That's correct.

Q. And that — is the C.F.A., itself, a member of the N.C.A.A.? A. Yes.

Q. What is — in what capacity? A. Allied member.

Q. So that out of the ninety-five or ninety-seven in one A now, as it's restructured, sixty-one are C.F.A. members? A. That's correct.

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[817] *Cross Examination by Mr. Coats:*

Q. Mr. Byers, I gather from your testimony that there has been, over the years, since the inception of the plan, a substantial increase in college live attendance at college football games? A. Steady increase, yes, sir.

Q. In fact, the television reports for 1981 report would show that since, say, 1954 to the present time, to 1981, the attendance has doubled? A. I would like to look at that chart, if I may.

Q. Yes, sir.

MR. COATS: Let me, for the record, indicate that I am handing you what has been introduced as Plaintiffs' Exhibit One Thirty.

Q. Referring to page fifty-four, I am asking you to compare the figures in 1954 to 1981. A. An increase of seventeen million to twenty-three point four. Is that your point, Mr. Coats?

Q. Yes. Almost double. A. That followed the four-year decline.

Q. Yes. So the answer to my question is, from 1954 to 1981, it went up from seventeen million to thirty-five point eight million; roughly double? [818] A. That seems to be correct, sir.

Q. Now, you also indicated that over that same period of time, that the N.C.A.A. was allowing some more and more television as they went along? A. That's correct.

Q. So you started with one appearance, and then you went to more than one appearance, and then you went to regional games, so there has been a concomitant expansion in the television that's available? A. That's correct.

Q. Even on to the time now, in the next year, when we will have quite a number of hours on television during the day, on Saturday, of college football? A. Well, the C.B.S. and A.B.C. games will be on Saturday afternoon, the Turner Broadcasting games will be on Saturday night.

Q. Yes, sir. How long does it take to play a game? A. A televised game is approximately three hours; a nontelevised game will come in two hours and twenty minutes.

Q. So on Saturday, for the next two years, we will have roughly nine hours on television for viewing of college football games? A. Well, we — I am not sure.

Q. "We," the viewer? [819] A. Well, depends on whether you have cable. If you don't have cable, you are not going to get the Turner games. So if you are talking about conventional T.V. households, you will have the A.B.C. and C.B.S. telecasts.

Q. You will have six hours, and if you have cable, you will have nine hours? A. That would be appoximately correct.

Q. Mr. Byers, those facts, doesn't that actually prove that the increase of attendance is concomitant with the increase of availability of television? A. No, it does not, because what you are saying is that you are assuming with great expansion of available coverage of T.V. in '82-85, is automatically going to increase in kind, but there's no evidence.

Q. Historically, one has grown as the other has grown over the whole years of your plan? A. Attendance has grown, but under a very carefully controlled television policy. That's the point I am trying to impress upon you, sir.

Q. And what I am suggesting is that it may have suffered its bumps back in the Fifties, but haven't we come to a time when you are going to have nine hours on television, and the attendance has doubled. A. That's almost non sequitur, to say you are going to put on nine hours on television and retain the attendance.

[820] No, you are not going to accomplish that, if you are going to have that available to viewers.

Q. You say there's some — A. The N.C.A.A. football plan traditionally has been directed toward learning to live and use football television for the advancement of the sport. And we have worked very diligently to combine both attendance and—in-person, in-stadium attendance, and television. So one helps the other.

Q. Yes sir. A. And that is what we have been working on, and we feel good about that. But the membership that lives with this thing day in and day out, and the athletic directors who live with this all the time are not in favor by all surveys and discussions we have had.

Q. Mr. Byers, that's beyond my question, and that's been ruled out. A. I'm sorry, sir. I was telling you how we arrived at the conclusion.

THE COURT: Just answer the question.

Q. Mr. Byers, as you continue the expansion of television, it's — you know, it's possible that you would expand to three-network at some point in time? A. It's conceivable.

Q. And other cable and V.H.F. packages? [821] A. You have to deal with the future when it gets here, sir.

Q. That's right. At some point in time you could have television football on all Saturday, really, couldn't you? A. Well, I suppose if you want to speculate, we could have twenty-four hours of television football, seven days a week. I really don't think that's the point.

Q. The point is, at some point in time, you would come to the point where you would even — perhaps even you would say, "Look, we've got so much on now, it has no effect at all upon the live audience"? A. Well, I am not sure — I am not sure what you are asking me at this point.

Q. Well, what I am trying to get is the relationship between live attendance and television. They have both grown on the curves you have, continued their paths until now you have nine hours on television, there's only, possible — suppose maybe a few more hours where there could be a college game on at some point in time. Doesn't it become logically completely irrelevant as to the live attendance? A. Well, Counselor, I think one of the problems in the illustration and discussion you are making here, is that you are saying "nine hours," meaning that in one market you have one game for three hours, and then there's going to be [822] another game for three hours, and then you come back over here at night and there's going to be another three hours at night.

When you turn television loose, that's not what happens. Because what you — if you have no television controls — and we will take Tulsa, for an example. What you would probably have in Tulsa is three games simultaneously on the three networks. You probably would have an independent station with a game, and you might have, in this three- to six-hour period that you are talking about, five or six different games. That, by itself, would enhance the impact adversely on in-stadium attendance immeasurably, in my judgment.

Q. We'll talk about that in a minute. Let's take that a little further. My understanding is that you are concerned about freeing-up television because the kind of "super powers" would take over, is that — A. I do not agree with that. That testimony has been made in this courtroom, and I don't agree with that. I have heard it, and I don't agree with that.

Q. So you don't — A. That's not the reason that we developed the plan that we have, because the C.F.A. threat forced us to do that, and that was a testimony here, and I don't agree with that at all.

This plan was based on very careful study and calculation [823] as to what was the best interest of the member colleges and the present circumstances as we know it.

Q. Well, okay. I want to be sure about that, because I had misunderstood you. I thought you said there was a good deal of fear, and part of the plan was based on the idea there would be a super power elite — A. A control —

THE COURT: That was the way I understood your testimony.

THE WITNESS: No. What I was trying to say, Your Honor, that the reason for control limiting the number of appearances of teams to every two-year period, we have kind of come up to three, or six in a two-year period, now, but the reason for limiting that is so the super powers don't get all of the good appearances, and they are spread among other teams.

THE COURT: That's what he is asking you now.

THE WITNESS: Then I misunderstood your question. I'm sorry, Mr. Coats. I misunderstood your question.

Q. So there is a figure that is part of your plan, that the plan is designed to avoid, and that is for letting the super powers sort of take over? A. The limitation on appearances is directed towards that objective, yes, sir.

Q. So — [824] A. I am sorry, I misunderstood you.

Q. Okay. So that by allowing Notre Dame and Michigan, allowing the network to select Notre Dame and Michigan to be on television, and limiting these kinds of other broadcasts you have talked about from the local institutions, somehow that protects or enhances the local stations able to do so? I don't follow that, and I wish you would explain that to me, please. A. Yes, I understand what you are saying.

Q. Yes. A. I don't agree with the surmise that you make, Mr. Coats, because if you turn television loose, which I assume is your premise, you are assuming that there is only going to be one or two games. And whatever market we want to discuss, we can discuss Tulsa or Oklahoma City, or whatever, taking Tulsa, you are making the assumption that there will be one or

two games, Oklahoma will go to Tulsa and maybe Notre Dame, and then Tulsa will be on the third station.

It's my considered judgment, and judgment of the people who worked on this, that will not happen at all.

Do you want to — shall I go on?

Q. Excuse me, let's go further. You heard Mr. Mohr's testimony yesterday, that he wanted to have on a Southern Cal game, for example, in Los Angeles, opposing on the network a national Notre Dame-Michigan game. [825] A. Yes.

Q. But the N.C.A.A. wouldn't allow that to happen.

Now, how is it that — let's assume it was Long Beach State, or someone else. How is it that that protects the smaller schools and prevents this super power elite from dominating? A. Mr. Coats, Mr. Mohr is looking today at the present circumstances. He evaluates ability to purchase a game and put it on On T.V., as attractive, because the N.C.A.A. plan restricts the number of colleges that can go on conventional T.V., and the number of times they can.

If you were to turn it loose, On T.V. is not going to be a buyer.

Q. Well — A. The conventional networks will buy U.S.C. and put them on every day in Los Angeles, and On T.V. will not be able to compete because they don't have enough subscribers to pay the television rights.

Q. Let me understand you. Your concern is that the schools like Kansas and Tulsa, and schools that have not been predominantly football powers over the years would not get chances to be on television? A. Under what circumstances?

Q. If they were turned loose, that they would not get a chance to be on television? [826] A. No, they would not have as good a chance to be on television under that condition, as they do to be on television under the current plan. Their chances would be less.

Q. How many times has University of Kansas been on television in the last ten years, under your plan? A. I don't have that data here. They have been on, essentially because I remember seeing it, but —

Q. How about like the University of Virginia? How many have they been on? A. I have heard testimony they haven't been on very frequently.

Q. The truth is, by allowing the networks to select the games under your plan, really what you have done is allow them to decide who the powers are going to be across the country? A. That's not correct, because our plan carries in it a minimum number of appearances that the network has to telecast. So what you have is a cap on the number of appearances that the super powers can have, and then you have a mandatory requirement that the networks have to put on so many different teams. Through those two devices, you spread appearances to almost all worthy teams.

Now, you use Virginia, I don't have Virginia's won-and-lost record here, but I don't think anything can be obtained by forcing a team on that hasn't won any appreciable [827] number of football games, and I suspect that's Virginia's problem.

Q. All right. Well, excuse me, but I thought one of your objections to the C.F.A. program was that there were appearance requirements, and you said it wouldn't be any good because they had to be on, had to put the appearance — A. I didn't say it wasn't any good. I was pointing out my memory of contracts. They wanted to get all sixty-one teams on, and when N.B.C. indicated that wasn't desirable because the problems I just cited, I think they went to a million-dollar guarantee in money. Now, I don't know what the final papers reflected, of course.

Q. We may take that up a little later. A. All right.

Q. Now, but back to my initial question for a moment, if you — if you start off with the idea that there is some connection between television and live gate attendance, and you see over the years a doubling of the live gate attendance, and you see substantial expansion in the availability of T.V. on television—on Saturday college football games, wouldn't you logically come to the point where you have so much of each that one no longer protects the other? A. I don't — you can make that kind of projection; I don't happen to agree with that, no. If you look at the attendance chart, I would like to look at that again, that [828] you showed me a moment ago. Is that permissable?

Q. Sure. A. You are taking a period of time—if you refresh my memory on that—from 1954 to when, Mr. Coats?

Q. Eighty-one. A. — to '81. I would like to point out to you that the increase in attendance — attendance in 1981 was point seventy-five. That's the smallest attendance increase, I believe, and I am just hurriedly studying that, for almost the last eight or ten years. I don't see anything, you know, to give great optimism that would lead you to project that in four years' time we can assume that we are going to have the kind of attendance increases we have had going back from 1952 up, because it's clear that our attendance is starting to peak, and we barely hit an increase this past year.

So based on that, I am just merely saying to you, it seemed to me stretching logic to assume that we can have this great, additional exposures, and automatically assume in the next four years we are going to have the kind of attendance increases that ran from 1954, which was your base period.

Q. Well, are — what you are saying, then, no matter how much the attendance increased over the years, and no matter how many additional hours television, you would still believe there had to be controls? [829] A. No, I don't necessarily agree with that.

Q. Then — excuse me. Is all we are arguing about is "when"? We say "now," and you say "not now"? Is that —

A. We are not arguing about a time difference at all. What we are saying is that the people who have to learn — the people who are responsible for administering these programs have to move in an educated and deliberate fashion to see that television doesn't destroy the programs that are so important to our institutions.

Q. Yes, sir. You have done that for thirty years. A. Yes. And we have been very successful in doing that. I want to point out to you, sir, that in that span of time, that the number of — I think it's an important statistic for you to consider in your projections — the National Football League in the last twenty-five years has moved and increased its number of teams by a hundred and thirty-three percent.

Now, what that has meant is that they have moved into major markets across the country in this span of time, and put teams in and dominated towns and cities where colleges used to be the dominating influence. They are now in twenty-eight, I believe it is, twenty-eight cities. And I think twenty-five years ago there were only twelve professional teams.

In that time, we have maintained and increased by some [830] thirty institutions the number of four-year colleges that sponsor intercollegiate football. In that same time we have had attendance increases for college football, and in that same time we have been able to expand television, but not have it hurt college football and not have the professional football television hurt us, because congress passed a law that recognizes they could hurt college and high school football.

What I am saying to you, sir, is that what this program has done, it's been good for college football, this very deliberate, studied process that we have gone through has been good for college football. It's been good for the spectators that go to the game, and it's been good to have the home viewers getting top games.

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[837] Q. Now, Mr. Byers, throughout that time, did the network pay — was there ever an incidence when the network paid more than the minimum aggregate fee for the proper year? A. I don't recall that, I wouldn't say positively, Mr. Coats, it did not happen, but I can't — I simply can't recall for the periods of time that you are covering.

Q. Well, I'm not trying to trick you, I think there was one — some testimony about a ten-thousand-dollar fee paid which might have been in excess, other than that, since—can you now recall any — [838] A. I will say it would happen infrequently; it probably did happen occasionally, but infrequently, that would be my best answer.

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[841] Q. Mr. Spence testified, and I think you heard me read from his deposition, that absent the year 19 — either '80 or '81, that in every other year in which he was involved, which goes back into 1971 or '72, that in every year the recommendations or the fee numbers for a national fee and a regional fee came to him from N.C.A.A., is that also your recollection? A. I don't have any problem with that, except as to who initiated it. Now, it's been my experience that in some years, A.B.C. requested the advice from the committee and in [842] other years, the committee, itself, made a recommendation to A.B.C., but beyond that distinction, where the recommendation began, I would agree.

Q. But in every year, there was communication between A.B.C. and N.C.A.A. television committee as to what rights might be appropriate for that year? A. No, not every year, that's not correct, sir.

Q. Which years were there not any such — A. When you are in a two-year cycle of plans, which we had been, I think for a substantial number of years prior to the 1978-1981 contract with A.B.C., usually, it's my memory, the price paid, a minimum aggregate compensation for each of those two years, remained the same. Now, that's my best memory.

Q. I see. And that was your exception to my question? A. Yes.

Q. It wasn't every year, but every time it became a subject for consideration, there was communication back and forth? A. Yes, that's my qualification, and, of course, in the four-year contract, the last four-year, it wouldn't happen in midstream because there was a consumer price index inflationary factor kicked in the last two years, and upped the minimum aggregate amounts.

Q. Do you know of any instances in which the N.C.A.A. [843] recommended a figure and A.B.C. did not accept that figure? A. It's my memory that on the six-hundred-thousand-dollar rights fee, which I believe prevailed in the last two years of the present four, the committee had suggested a different figure, and A.B.C. locked in at six hundred thousand. I can't tell you what figure was recommended, but that's my best memory on it.

Q. Do you recall what figure they suggested? A. The committee?

Q. Yes. A. I really don't know, Mr. Coats.

Q. Do you know of any other instances where they did not follow — A. It's my experience that there were changes in what either the committee recommended by request or by volunteering, but the changes would not be substantial. I'm not trying to debate that point with you at all.

Q. So that in most years, whatever the N.C.A.A. recommended, is what indeed the fee was? A. In most years, that's correct, but although A.B.C. at the same time had the authority and power to do what it wanted.

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[844] Q. Now, did it concern you or the committee at any time that it didn't appear that there was a lot of differential in the prices that were indeed the same year after year? A. No, I don't think it bothered the committee, and I don't think it bothered third-member institutions, it was a practice which the membership accepted and which the committee accepted on behalf of the membership, because they thought it was for the best welfare of college football —

Q. Well — A. — on both sides. I think the network felt the same way, Mr. Coats, that strength of college football was important for the game and important for good television.

Q. But the effect of that was to make the minimum aggregate fee the maximum aggregate fee and amount of fee paid each year, wasn't it? A. Not to the process you described, not make — if you used the words "the aggregate amount, the maximum amount," that practice did not do it.

Q. Are you just saying it just happened, it didn't — no forces made it happen, it just happened? [845] A. I'm saying that in the practice of the network going to the institutions and in many instances, the institution knew they had the power of a super power game of a premiere game, they — many of them would know that they had the power to hold out for more money, but exactly in the Jim Spence deposition that you read here, whatever day that was, the practice surfaced when Chuck Neinas — when he was commissioner of the Big Eight Conference, asked Jim Spence why he wasn't paying more — asked him to pay more for the Oklahoma-Nebraska game, and Jim Spence's response when you read it, was, "Well, I will pay more for Nebraska-Oklahoma, but I intend to take a regional game out of the Big Eight," which I think was an Iowa State game which is my memory, and I wouldn't pay as much for Iowa State.

Well, at that time, as commissioner for the Big Eight, Mr. Neinas could have said, "We are not going to give you

Nebraska-Oklahoma unless you kick that price a hundred thousand dollars," or whatever, but he didn't do it, no. Why didn't he do it? He felt he was taking money out of Iowa State's pocket in the process.

Q. I couldn't agree more with what you're saying there, and it seems to me that is the point. N.C.A.A. sits there and sees these things going on, sees the same fees every year, sees the minimum aggregate fee becoming the maximum and so forth and say to your people, "Gosh, guys, get in there, negotiate, this is just a floor, and there's a lot of money [846] out there and these networks are willing to pay it, get in there and negotiate for it," does N.C.A.A. ever do that? A. Excuse me?

Q. That's — did N.C.A.A. ever take any action in that regard? A. We — I don't agree with the characterization leading up to your question, sir, as to what kind of action we took in that regard.

Q. Well, I want to know if you did, did you take any action in that regard? You saw these things occurring, did you respond and react to them? A. Excuse me, would you mind stating the question — the question you asked me, please?

THE COURT: Try to pay attention to the question, Mr. Byers, I get the impression you are trying to change the question. Would you please do that?

THE WITNESS: Yes, sir. I'm not really trying to do that, I apologize, I have a little trouble sometimes following the question that he is asking.

THE COURT: Just listen to the question, it might be helpful.

Q. We saw the minimum aggregate fee stay the same, and you saw that, and you saw the payments each year stay the same, and you tell us that the institutions were free to negotiate, and that this minimum fee was merely a floor, my [847]

question to you is, what did N.C.A.A. do? Did you get out and tell the members, "Get out and negotiate, you could get a lot more money if you do these things"? A. The members — most of the premiere institutions knew that they had the right.

Q. Excuse me, Mr. Byers, I am really not asking what they knew, I'm asking what you did, what did you and N.C.A.A. do? A. Well, we informed our members through the reports that they had the right to freely negotiate and surely the district members on the television committee informed their members: Don Canham from the University of Michigan was on the T.V. committee, and informed the members of Big Ten; Chuck Neinas was in the committee from the Big Eight Conference, I assume he informed the members in the Big Eight.

Q. Did you personally do anything to get that done? A. No, I personally would not, it would not be my job.

Q. Did you direct Mr. Hansen to do that? A. I don't know that I directed Mr. Hansen, no.

Q. Did you come forward with any bulletins or memorandum saying, "Gosh, folks, we are missing a big opportunity here because this is merely a floor, and we could negotiate and get a whole lot more money for the whole thing," did you do anything like that? A. I'm saying in the reports, the minimum aggregate [848] fee was paid, and the members knew that was not a ceiling, as far as exhorting the membership to negotiate aggressively, we did not exhort them.

Q. Did you — did you see the telegrams that went out from A.B.C. to the member institutions? A. I had never seen them until you put them here in evidence.

Q. You were not aware that they said in an attorney correspondence with the N.C.A.A. contract, you are required to accept these fees? A. No, I had not seen those, no.

Q. Do you know of any occasion where somebody other than the one mentioned by Mr. Spence discussing with Mr.

Neinas where somebody went and attempted to negotiate a different fee? A. I believe that this is secondhand response to that, I believe Don Canham, University of Michigan, was athletic director there, at one time talked to A.B.C. about paying a higher fee for the Ohio State-Michigan game, and that did not carry forward to a — results of a higher fee, however.

Q. Mr. Byers, did it occur to you that maybe the reason that that wasn't happening was because you had put the school in a situation where they had no negotiating power, take the power away from them — A. No.

[849] Q. — because they don't compete with anybody else? A. Excuse me, I do not believe that we have taken the negotiating power away from the institutions at all. The institutions have the negotiating power to get more money for their premiere games, that power is there if your game is strong enough. The result of that, however, and let me give you an example, in the Big Ten, the result is that if they pay higher for Michigan-Ohio State in Big Ten, A.B.C. will turn around and not pay as much for another game in the Big Ten, that's the result, I don't think that's the result of what we have done. We have put a minimum aggregate floor under these prices so that the network won't grind down the fees paid to those games which have less bargaining power.

Q. Mr. Byers — A. There aren't enough quality games in college football to give enough teams the power to bargain over the minimum aggregate price, and that has been the results through the years, and we recognize that.

Q. Well, would you agree that the schools do have some obligation to maximize the income from their programs? A. Well, yes, I assume they want to do — within reasonable educational restraints, sir.

Q. Of course. A. Yes.

Q. And they haven't done that over the years. Now, [850] you know, why is it that these games you talk about that you think are more valuable, what fault happened to prevent them from being able to get anything else? A. I don't agree with your premise, sir, that the colleges have not maximized the income potential from television for college football, I think the system that we have set up, I think the bargaining that's taken place, and I think that rights contracts that have been executed, have indeed maximized college football's ability to draw strong rights fees in the marketplace, and I think if you look — if I may, sir, I think if you look at the cost per thousand, which figures we c[illegible]ow you for rights, the cost per thousand viewers, divided for the rights paid, you will find that college football is one of the highest priced cost per thousand for viewers drawn of any sports program in the marketplace.

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[851] Q. And you understand, Mr. Byers, that in an economic sense, when you have really only one buyer and one seller or even worse than that, you have one buyer and lots of possible sellers, you don't have any negotiating position? A. I don't agree with that. In an economic sense, I think we have exercised very strong competitive positions through bidding and in some instances, bidding and negotiating [852] the football T.V. rights under the N.C.A.A. plan, I think it's been a very aggressive business transaction in the open market place among all people that want to buy those rights.

Q. Yes, sir. "We" meaning the N.C.A.A., when they go — when they become the exclusive bargaining agents, not "we" meaning the individual universities? A. Excuse me, I missed the question.

Q. You keep saying, "We," and I assume you're saying, "We," the N.C.A.A., negotiated this and did all these things? A. Well, the colleges and universities through a deliberate process have approved a plan, a set of principles, have elected a

T.V. committee, the T.V. committee has acted for the membership in implementing the rules that the members have adopted about T.V. and sold the rights authorized by the membership.

Q. Let's talk for a minute about this selling and bargaining agent. As I understood your premise for the N.C.A.A. being the bargaining agent for football, it was to protect live gate attendance, is that the basis on which this whole system has arisen? A. No, I have tried—I have tried to speak to the point that it has several objectives.

Q. All right. A. One is certainly the reason it was initiated and still one of the most important, not the most important reason, [853] is to protect the in-stadium personal — in-person attendance against the deletory effects of live television.

Q. What else? A. The second objective which surfaced almost in '51, '53, or '54, and has been paramount ever since is to — is to limit the appearances of super powers so that there would not emerge a very narrow T.V. aristocracy dominating college football and later objective as we moved into regionalization of college football was to spread the appearance opportunities and the monies among more institutions who desire to maintain one A and one double A football programs. Those are the objectives as I see them, Mr. Coats, and remain valid today.

Q. All right. Well, let's take another example. You limit the number of coaches that a team can have, do you not? A. Well, we limit the number of football coaches.

Q. Yes. And basketball coaches, a member institution — "we" being the membership, they enacted the bylaws that implement that employment factor.

Q. And yet you don't become the entire employment agency, you don't have to hire all the coaches to do it, you do it by limiting the coaches and enforce said — A. Bylaws limit the coaches that the members may employ in those sports.

Q. Couldn't you have achieved exactly the same results [854] by limiting the amount and same dollars you had by simply limiting the number of teams that could be on television without the necessity for the N.C.A.A. becoming the chief bargaining agent and limiting the schools in which they could deal with? A. When you say, "you could limit the number of teams," you mean —

Q. Yes, a question of limitation, the team can only be on three times? A. And that would be the only rule?

Q. Yes, sir. A. No, sir, I don't agree you could achieve the objectives set forth by that, that's called hully-gully, that's been before the committee off and on, before the committee since the Sixties, that's a Texas term, but they adopted it to call it the hully-gully plan.

Q. I suppose that's why it seems all you would need to do, you would protect gate attendance by keeping the super powers off television and at the same time you would keep them from being super powers on television because they could only be on a few times and they would be free in the marketplace to do the best for their programs, why wouldn't that reach your same goals? A. I think several factors have discouraged the committee through the years recommending such a plan, in fact, it was [855] discussed preliminarily and not in detail this last time around. First, if you did what you had in mind, Mr. Coats, it's estimated that you would increase by — these figures are approximately, obviously, about forty-five percent the amount of college football that would go into a given market. We have run projections of a hundred. One that I think — most logical would be that you would have in any multi-station market — multi-station, I mean, more than the three principal network outlets that go into four or five, and any of those markets that you would have an increase of at least forty-five to fifty percent in football telecasting on Saturday afternoon.

Q. Let me stop you there. A. Yes.

Q. Wouldn't that be one of your purposes, to kind of spread it around and get more folks on television? A. That, in our judgment, would increase the damage to gate, because if you have a market, a choice, you have a choice under the current plan of two games, A.B.C. or C.B.S. And let's take Chicago, or any of the major markets, concentrate on Chicago, under the system that you propose, it would be estimated that certainly you would have a game on each of the three owned and operated network stations in Chicago that would be the start. You would have one on W.G.N. for sure, and probably have one on U.H.F., which would be five games in [856] Chicago, and maybe even six games. What you have done is give the spectators of Chicago, who liked college football, many more choices, over reasons to stay home instead of go out to a college game.

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MR. COATS: Anyway, your answer is that simply placing a limitation on there, in your judgment, would increase the amount of television, and I wonder if that couldn't also be altered by decreasing the number of games again? A. Well, I didn't — if I may finish —

Q. Sure. A. — commenting on the other reasons why the committees felt it was undesirable. I think what — I think what you also find is that the — the premiere games would [857] be — would be taken by the networks, there would be fierce bidding for a group of premier games first; Notre Dame games would be for most, probably the second bidding process would tie up the major conferences, and I think you would then find a network trying to buy Big Ten and Pac Ten together as a unit and in that process, I think you will find that there would be a lessening of appearance opportunities that are mandated under the present plan because what you would have is a hully-gully situation where the networks are buying the premiere games and what is left over is small regional presentations for the second strata of one A. At the present time, the second strata

one A. those are the teams that we think ought to try to be — remain competitive and catch up with the leaders, if you buy the Iowa States of the world in the Big Eight or the Vanderbilts and L.S.U. or T.C.U., Vanderbilt and T.C.U. in the Southwest Conference — under the present plan, when those institutions get on regional, they have a broader audience base, and they get more money. Under the hully-gully, the institutions, the second strata, and if you want to drop down below that, would be on fewer stations and receive less dollars. There's a third factor that I think you ought to consider, Mr. Coats, and that is I think as far as the presentations on behalf of college football, I'm talking about the way the network treats the game, I think you will find that you would be — and the number of commercials and type [858] of commercials and the requirement we have that you put on a minute of a higher education message and also put on educational messages from the two participating institutions, I think that would all go by the board as the proper standards of presentation in the proper restraints on commercials.

For example, we limit the number of commercials. We began some types of advertising; all that would be governed by, you know the — determining the lowest common denominator because those standards will go down the tube in that kind of hully-gully situation.

Q. Excuse me, that is not so you can buy a fiat and limit those by placing the — limiting the universities exactly as you could do the other restraints? A. Your rule was, you only had three appearances a year, that's the way you set your question up.

Q. If I did, then I misled you and I didn't intend to because all I'm talking about is the question, if you have to be the bargaining agent for them or — whether you can do the same thing by ruling which leaves the universities free to negotiate their own — negotiate with whoever they want to and it's that distinction I haven't seen a valid reason for, and still

haven't heard one. A. If you're saying, take all the terms of the present plan and put them in the bylaws with the only exclusion being then that as long as you obeyed the plan as it's embraced [859] in the bylaws, you are free to do what you want, my answer — first two answers remain the same. You could build in the commercial restraints, the educational messages, the announcer approvals those type of standards of presentation, you could, I presume, put that kind of detail in the bylaw, I still think my first two responses to you are applicable.

Q. You know, you're dealing — first of all, I think we have your third factor. Now, back to your second factor, the schools that you say you're trying to protect, the middle level one A schools, and you have heard testimony from these other prople, they would love the opportunity to put those very schools on television, and those are the ones that never get on the—your package and yet you're saying somehow you are protecting them by eliminating their opportunity to be on regional television? A. First, we are not trying to protect them, we're trying to help them get on television, but the testimony that you have had before the Court, Your Honor, on the desirability of these marginal teams is only because these potential buyers see them desirable because they are limited and not on television, as such, under our plan. In other words, they look — even on T.V. looks at U.S.C. and says, "U.S.C.'s taped games are very valuable to us," it's because our plan limits U.S.C.'s appearance in the Los Angeles market. If you free up television so these teams can go on on a Saturday, [860] the market, to the extent that I have spoken to, Knasas, Mr. Coats, or Iowa State, in my judgment, is not going to get the kind of coverage and amount of dollars that they do under the present distribution system of the N.C.A.A. plan.

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[884] Q. All right. I got the idea from what you said earlier, that you had stated that if television was opened, that the value of these packages over the years would have been dramatically

affected, it was the exclusivity and the controls which has helped increase the value of the rights fees? A. I think that the program we have conducted has resulted in greatly escalated rights fees for colleges that I already detailed in my testimony.

Q. And that that would not have happened had there been—had other schools been free to go out and do other television when they wanted to? A. If your question is — I'm not — if these responsive — I'm not convinced that you increase the total amount of dollars spent on college football by having no controls whatsoever, is that responsive?

Q. Well, it helps. So that the exclusivity has meant money as far as the amount — the contract price over the years, the fact it was exclusive has increased the value of the contract, hasn't it? A. The fact that there is — the fact that every television market in the country is not saturated with all forms of college football on Saturday afternoon, I believe has enhanced the value of college football, and I think [885] Jim Spence addressed that point in his deposition, at least the way I heard it, when I heard it the other day, I agreed with Jim's assessment. I think that's true. That the flooding of the market does not enhance the value of college football and also in my judgment, damages attendance at college games.

Q. All right. Let me see if I can get an answer, ask a question where I can get an answer that is, yes.

Is there — is the fact of the exclusivity had an increasing effect on the dollars that you could receive by negotiating this package? A. You're talking about the current contract?

Q. At any time, Mr. Byers. A. Well, I respond to the word "exclusivity" the same way I responded earlier in my testimony because I do not think these three contracts now in place between N.C.A.A. and three different networks are — are exclusive. I think that the prices that have been received from these three contracts are enhanced by the fact that the markets — T.V. markets on Saturday afternoon are not flooded with all forms of college football.

THE COURT: Why don't you try again, Mr. Coats.

MR. COATS: Yes, sir, I think I will, I'm sorry.

THE WITNESS: Am I missing something?

THE COURT: Either that, or you are evading it, sir.

[886] THE WITNESS: I'm certainly not trying to evade, I can guarantee, Your Honor.

Q. (Mr. Coats, continuing.) Does the fact of the limitations — do you like that word better than "exclusivity" of the N.C.A.A. television package and plan and contracts have an increasing effect, have a generating heightening effect, in terms of dollars you can receive for the sale of the rights? A. I though I responded to that by saying that the fact there is only three programs on, as opposed to having unlimited football T.V. on, has enhanced the value of these three programs; isn't that responsive?

Q. Well, does that mean, yes? A. I don't — I guess it does, if that's the question you're asking.

* * *

[893] **WILLIAM M. LANDES**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

[894] *Direct Examination by Mr. Andrews:*

Q. Will you state your name and address, please? A. William M. Landes, L-a-n-d-e-s. And my address is 5727 Kenwood Avenue, Chicago, Illinois.

Q. What are your current professional provisions? A. I am currently the Clifton R. Musser professor of economics at the University of Chicago Law School, and in addition to that, I am a principal of a consulting firm called "Lexecon."

Q. What is the Clifton R. Musser economics chair? A. That is an endowed chair at the University of Chicago, set up by the Musser family to establish a permanent position for an economist at the law school.

Q. Doctor Landes, why is an economics professor at the University of Chicago Law School? A. It goes back, I would say, almost forty years that the University of Chicago Law School has had an economist as a full-time member of their faculty. And one area that I have been involved in, teaching at the University of Chicago Law School, has been antitrust.

In addition, there is growing research in the area or applications of economics to law in such areas as contracts and torts. And I, for example, have taught a course in economic analysis of law to both law students, and students [895] in the economics department.

Q. Would you tell us, Doctor Landes, about your other professional positions you mentioned, at Lexecon? A. I am a principal at Lexecon. Lexecon is a consulting firm that provides a wide variety of economic consulting services, primarily in the

area of antitrust, but not limited to antitrust. We work also in areas such as products liability, regulation, and employment discrimination.

Q. Who formed Lexecon? A. Lexecon was formed approximately four-and-a-half or five years ago, by myself and a colleague at the law school, Dick Posner, who was at that time a professor of law at the University of Chicago Law School, and Andrew Rosenfeld, a graduate of the University of Chicago Law School.

* * *

[896] Q. You mentioned Richard Posner. Is he still with Lexecon? A. No, he severed his ties with Lexecon in December of 1981. He is now a court of appeals judge on the Seventh Circuit in Chicago.

Q. Are you affiliated with any academic journals? A. Yes. I am the editor — or an editor, there are now three editors — an editor of *Journal of Law and Economics*, which is one of the leading industrial organization journals in the economics profession.

Q. Doctor Landes, are you a member of any professional societies? A. The American Economic Association.

Q. Could you briefly describe for the court your educational history? [897] A. I graduated Columbia College in 1960 with an A.B. degree, and I received a PhD from Columbia in 1966, in economics.

Q. Could you state briefly also your employment history? A. Yes. My first full-time job after graduate school was as an assistant professor of economics in the department of economics at Stanford University. I then moved to the University of Chicago in the department of economics, as — again as an assistant professor. Then to Columbia University for several years as an associate professor. I spent a year-and-a-half at the graduate center at the City Center, University of New York, as

an associate professor. And in 1974, I moved back to Chicago, and I have been at the law school as a full professor since that time. And several years ago I was appointed to the chair of Clifton R. Musser professorship.

Q. Doctor Landes, in what branches of economics do you specialize? A. Macroeconomics, industrial organization, particularly antitrust economics, and questions such as definition of relative market, which is a branch of antitrust economics, and the economics of broadcasting.

Q. Is one of your specialties also quantitative or statistical analysis? A. Yes. I have done a good deal of quantitative and [898] statistical analysis ever since my dissertation, which the subject was on the economics of fair employment legislation, in which I tried to measure, using quantitative techniques the impact of state fair employment legislation.

Q. In addition to your work in this case, Doctor Landes, have you studied the economics of television and advertising? A. Yes, I have done a number of studies at Lexecon in that area.

* * *

[901] Q. What was your assignment in this case? A. Again, I don't like to quite put it that way. I don't think I had an "assignment" in the case. I investigate the question of whether college football is a relevant market, or what is the relevant product market in this case, whether the N.C.A.A. has marketing power in that market, whether the N.C.A.A. is able to restrict output in the relevant market, and also I investigated the question of the effect of N.C.A.A. controls on in-stadium attendance.

Q. What did you do, briefly, to study those matters [902] in this case? A. I conducted a series of empirical studies, both the product market definition question and the in-stadium attendance question.

Q. Did you also become generally familiar with the issues in this lawsuit? A. Yes. I became familiar to the extent it was necessary to do the empirical work I had set out to do.

Q. At the outset, could you explain in a general way what these empirical economic studies were, and go into them in much greater detail later? A. Yes, I can explain them very briefly.

One, I examined the prices that — of N.C.A.A. programs, compared the prices of N.C.A.A. programs to programming prices in general.

I examined advertisers who advertise on N.C.A.A. programs and other sports programs, and programming in general.

I examined in-stadium attendance and did an empirical study of in-stadium attendance.

And finally, I examined data on viewship of N.C.A.A. football games, viewership patterns and demographic patterns of N.C.A.A. football and other sports programming.

Q. Doctor Landes, can you state briefly the conclusions which you reached as a result of those detailed empirical studies? [903] A. Yes. That college football is not a relevant market; the N.C.A.A. does not have market power in a relevant market; that the N.C.A.A. is not able to restrict output in an N.C.A.A. — the N.C.A.A. is not able to restrict output in the relevant market, even though the N.C.A.A. is able to limit the number of football games that are televised, that is not from an economic stand point equivalent to a restriction in output in a relevant market. And, therefore, the N.C.A.A. lacks market power in a relevant market.

And in the question of investigating attendance, what I found was that television — televising football games has an effect, adverse effect on in-stadium attendance.

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[904] Q. So that's clear, Doctor Landes, what does "price-fixing" mean to an economist? A. Well, from an economic standpoint, what "price-fixing" means is a restriction in output in a relevant market.

Let me put it a slightly different way: in order for a cartel to be successful, let's say, and set a price above the competitive level, which we would refer to as "price-fixing," the cartel must be able to restrict output. And, in fact, it's the restriction in output that brings about the increase in price.

So when we use the term "price-fixing," that's a shorthand way of talking about a restriction of output in a relevant market.

Q. Doctor Landes, does that mean that a change in price or an increase in price is, itself, objectionable? A. No. The increase in price is not objectionable. What's objectionable is the restriction in output, which leads to what the economist refers to as a "deadweight," or efficiency loss.

Q. In short, is a monoply objectionable to an economist because it is inefficient? A. Yes. I think I would say that's a very good way [905] to put it. It's not the increase in price, in and of itself, that is objectionable to the economist; what is objectionable is the restriction in output, which thereby makes for a higher price.

But that restriction results in a deadweight, or sometimes economists refer to it as a "social loss," or allocative loss, or efficiency loss. They are all roughly equivalent ways of describing the loss from monopoly cartels or price-fixing.

Q. Is the same thing true, that the economist's objections to limitations on output or price-fixing are because they are inefficient? A. Yes; I think that's — that basically is what I said just before, that it's the restriction on output. It's inefficiency or deadweight loss, allocative inefficiency or deadweight loss brought about by that restriction in output.

Q. Doctor Landes, do all agreements on price constitute price-fixing? A. No, certainly not. Let me expand on that and give you, I think the easiest way to see that is if I go through several examples.

The first example, suppose a group of lawyers, maybe ten or fifteen lawyers in New York, informally set up an agreement among themselves to form a law firm. They may, [906] prior to this time, have been directly competing with each other. They are no longer directly competing with each other, they may have a uniform price for legal services. In addition, they will devise a formula, or they will have some mechanism for dividing the revenues at the end of the year.

Yet, no economist would say that constitutes "price-fixing," because in this market, there are many law firms, many lawyers. This law firm, this set of twenty lawyers that have been — that have set up a firm, are unable to really restrict output and raise price. In fact, there are probably benefits of setting up the law firm in terms of reduced costs or efficiencies, or gains from specialization. So one wouldn't refer to that as a "price-fixing" agreement, even though the lawyers no longer are competing directly with respect to sale of legal services, and because they have a formula for dividing up the revenues.

Take another example, and one that I had some actual — actually somewhat more familiar with, is in the A.S.C.A.P. case.

In A.S.C.A.P., the composers and publishers have an exceedingly elaborate set of formula for dividing up A.S.C.A.P. revenues. And that formula is weighted, depending upon whether a performance is on a network, whether it's on a local T.V., whether it's on radio; and the composer and authors that receive this revenue. Certainly, that practice was never [907] challenged in the A.S.C.A.P. case.

What was challenged was the blanket license as restriction in output, not the formula that A.S.C.A.P. has for dividing up its revenues; that was never challenged, and certainly not found to be price-fixing by the Court in that case.

I also might add in the A.S.C.A.P. case, that in addition to the elaborate formulas for dividing up revenues among A.S.C.A.P. members, there was a weighting scheme in which a network performance of, say, a feature song, got an equal weight regardless of which network it was played on. how popular the show was on that network, whatever the network show or populatiry of the performance, a feature song would get the same weight.

Similarly, for them, music, and so on, although there was this formula, there was no attempt to gear it in a fine way to say the different degrees of popularity of shows.

Q. Doctor Landes, there's been discussed in this case, conference revenue sharing arrangements for television revenues, whereby the members of the conference pay into the conference the receipts they receive from football television, and then they allocate them back to the members, occasionally those appearing on television getting a greater amount than the other members of the conference. A. Yes, I think that's the same, really, as the [908] A.S.C.A.P. example, that the way the conference members allocate revenue among themselves has nothing to do with price-fixing—which, as I have indicated before, is a restriction in output.

Let me just finally get one other example. Suppose a series of entertainers such as Bob Hope, Barbra Streisand, Frank Sinatra, and a few others got together to set up a series of specials to be shown on prime time on the network.

Clearly, these people are going to set up some arrangement to divide up the revenues, and, yet, no economist would refer to that as a "price-fixing" agreement, because that program or that series of programs are now competing in a broad programming market.

Q. Does division of revenue among the joint producers have anything to do with consumer welfare? A. No, it doesn't, as far as I can tell. It's strictly—strictly an allocation of

revenue. The key issue is always, from an economic standpoint, whether the practice in question that one is examining, is one that restricts output.

In that case, it would harm consumers. If the practice doesn't restrict output, then, however the revenues are divided up, whatever formula the members, say, of a joint venture have for dividing up their revenues, that is not price-fixing, and has nothing to do with the economist's [909] objection for price-fixing.

* * *

Q. Doctor Landes, I want to turn now to the prior N.C.A.A. single-network contracts with which we have all had experience, such as the agreement between A.B.C. and N.C.A.A. for the years 1978 through 1981.

Are you aware that in practice the schools had been paid [910] by the network basically the same amount for all national games, and then a different price but basically the same amount for all regional games? A. Yes, I am.

Q. And from an economist's point of view, is that any indication of price-fixing in an economic sense? A. No, it is not. It comes back basically to what I said before. There are packages being sold to the networks by the N.C.A.A., the critical issue is whether there is some restriction in output in a relevant market.

How that revenue from the package is divided up among colleges and universities has nothing to do with the question of whether, from an economic standpoint, the practice is price-fixing.

Q. Doctor Landes, are you aware that the last N.C.A.A. football television contract with A.B.C. for 1978 through '81 contained a minimum aggregate compensation term which provided for a total sum of rights fees to be paid in each year of the agreement? A. Yes, I am.

Q. Why would you expect to find a minimum aggregate compensation term in that N.C.A.A. network contract?

* * *

A. I think that's a necessary accompaniment to the [911] N.C.A.A. network contract; that is, once you sign a network contract and negotiate and contract with a single network, that network is potentially in the position of what an economist refers to as a "monopsony," or single-buyer.

And with a large number of competing football games that could be shown on the network, in the absence of the minimum aggregate compensation, the schools, I assume, would get very little revenue.

What the minimum aggregate compensation does, it permits the schools to get some revenue from the telecasts.

* * *

[916] Q. Before turning, Doctor Landes, to your studies of the particular relevant market in this case, could you describe for us the television industry, television broadcasting industry? A. Yes, I can describe it very briefly.

There are basically five components in this industry. You have the viewers. You have the television stations which include the network affiliates, the independent stations, and those stations that are owned and operated by the networks. And total, it's roughly about seven hundred and twenty [917] stations.

In addition, you have the networks, which are essentially the brokers in this market. And I will explain that shortly, the three networks.

You also have the program suppliers, and, of course, the advertisers — the advertisers being the principal buyers in the market.

Q. Where do the television viewers in the homes fit into that? A. Well, as I said, the networks are essentially the brokers in this market. And what the networks do, they acquire programs, not because of any intrinsic value of a program, but because a program, when it's shown, say, by an affiliated station, will attract viewers. And viewers are valuable because advertisers value viewers. Advertisers are able to reach potential customers by advertising their products over television.

So the essential buyers in the market are advertisers. The networks can be thought of as the "brokers" that deliver viewers to the advertisers through an intermediary; namely, their affiliated stations.

But the essential buyers in the market would be the advertisers.

And then you have the program suppliers that provide programs to the networks, and networks also produce some of [918] their own programs, as do some of the independent stations.

Q. Are there many suppliers of television programming? A. There are many suppliers of television programs, including major studios, minor studios, the networks produce some of their own programs, various stations have production subsidiaries which produce programs.

I think everyone who has studied this market, the programming market, concludes it's a competitive market, and that includes a recent study by the Federal Communications Commission that looked at programming in general and concluded that the program supply market was a very competitive market.

Q. Is the N.C.A.A. one such supplier of television programming? A. Yes, it's one such supplier in this competitive market.

Q. Doctor Landes, does the N.C.A.A. have market power in this total television programming market? A. Well, the N.C.A.A. certainly does not have market power, because as I have indicated earlier, that on the basis of my studies, that college football is certainly not a relevant market; in a broad programming market, of which the N.C.A.A. is a part of, its share to be too small to warrant an inference that the N.C.A.A. has market power.

Q. Doctor Landes, could you give us a brief summary of the empirical studies that you performed? [919] A. Yes. I examined the relationship of N.C.A.A. program — N.C.A.A. football program prices, and correlated or compared them to prices of programming in general, which I found the prices moved together.

I examined the advertisers who advertise on N.C.A.A. programs. I again found that you did not have a specialized group of advertisers; that is, advertisers that were specialized to the N.C.A.A., but those advertisers that advertise on the N.C.A.A. advertised in a broad variety of programs not just limited to sports programming.

I also found that in terms of analyzing viewership trends in several geographic areas across the United States during the period of October and November, that in terms of a sports viewership market, the N.C.A.A.'s market share was far too small to warrant an inference that it had market power.

I also looked at viewership in terms of certain demographic characteristics, and again concluded inadequate N.C.A.A. share in terms of market power.

Finally, I did a study of attendance, though I am not sure that is the response to your question.

Q. Did you do an additional empirical study? A. Yes.

Q. Would you describe that? A. That was a study based over a five-year period of approximately — approximately

thirty-one schools, so that [920] each observation was attendance at a particular game for a particular school, that you had roughly seven hundred and fifty observations to work with, limiting the schools to the Oklahoma-Georgia area.

And what I intended to do there was use multiple regression analysis, which is a statistical tool that is used by economists and other scientists, was to try to measure what the impact of televised football, holding constant other factors that are relevant to the determination of attendance, such as weather, whether the game was a homecoming game, and various other factors.

* * *

Q. Doctor Landes, would you describe for us, please, Defendant's Exhibits ZB-two and ZB-three? A. Yes. Here what I did was to look at program prices, both the N.C.A.A. contract price per game and network, and T.V. station program prices.

Now, the purpose of doing this is — at least a purpose of doing this is to determine if two products are in the same market. It's a very common practice in the antitrust area to examine whether prices move together on the theory, if [921] products are linked on the demand and supply side; or the demand and supply side, if they are linked in this way, that their prices will tend to move together on the theory, say, that if you have two products, "A" and "B," and they are linked, or either demands or supplies, that if the price of product "A" were to start rising relative to the price of product "B," either consumers would substitute away from product "A" into product "B," which would tend to put a downward position on product "A," and upward price on product "B."

Or, if the consumers don't make the substitution, that suppliers would substitute toward product "A," which would tend to expand its supply and reduce its price, and away from product "B," which would tend to increase its price.

So that you would suspect, if the products were linked on supply or demand side, what you would suspect would be that the prices would tend to move together, and that is the test that I performed in what I have labeled in my report figure six and seven, but are labeled here ZB-two and ZB-three. I can briefly go over these if you would like.

* * *

[922] Q. Will you go on further and explain that empirical study? A. Well, let me just go back one factor in determining whether I would call it really one factor in determining whether products in the same market moved together.

And I want to emphasize the move together. It's not the level of the prices that are critical. For example, one could have a fifty-hour light bulb, and another light bulb that would last a hundred hours. And I would expect the light bulb that would last a hundred hours to be twice as expensive as the light bulb that lasts fifty hours.

But I would suspect that because of the demand among consumers on the supply side, that even if there is a difference in price of those two products, that would move together over time.

That is basically what one says in figure six and figure seven, in which I have the red line, refers to the N.C.A.A. contract price, the blue line is an index of programming and technical expenses for both the networks and the stations.

And they are all put on identical units. That is, it is on an index value, because it is clearly a tremendous difference in level, because the expenses of the networks and stations are over two million dollars a year.

And what is done is in 1970, they are set equal to the [923] value one. They are both set equal to a value of one. So they are on comparable units, so one can compare them.

And it's clear in figure six that what one sees is a similar pattern as to the movement in the prices in these two series.

However, I think this goes too far, because you have general inflation during this period, and prices in general were moving up, particularly in the late Sixties and early Seventies. So what I have done in figure seven is to deflate both series by the Consumer Price Index —

THE COURT: Pardon me, Doctor. You say in figure six and seven, are you referring to the exhibit labels?

THE WITNESS: Yes. I'm sorry, ZB-two is six, and ZB-three is seven.

And in ZB-three, what I have done is to deflate both series by the Consumer Price Index, so in effect, we are dealing with movements in real prices. We have taken away from the movement in these series, and we have taken away the price changes due to inflation.

Let me put it another way: in figure six, there is partially a superior relationship between the two series, because of the general relationship in the two prices. Figure seven attempts to deal with this by putting real price terms, by making adjustment for the Consumer Price Index.

And what I find in figure seven is, indeed, the two [924] series tend to move roughly with each other.

In fact, I also computed a correlation coefficient, which is a statistical measure, or how close the two series are. And the coefficient I think is about point seven or point eight in significance, indicating a close correspondence between the two series.

* * *

[925] Q. Doctor Landes, could you explain for us the source of the data which you used in compiling Defendant's Exhibits ZB-two and ZB-three? A. Yes. The N.C.A.A. data is straight-

forward, that comes from the N.C.A.A. contract price. The programming and technical expenses of the networks and the stations comes from the Federal Communications Commission's annual reports for each year, where they have a category called "program and technical expenses," which is principally programming expenses.

I believe they get the information from the network separately, programming and technical, but they compile it as a single number, program and technical expenses.

Q. Doctor Landes, what do you conclude from exhibits ZB-two and ZB-three, as to whether the televising of college football games is in a separate relevant product market? A. Again, I think it is one factor, the movement of prices. I don't think it's a sufficient — it's not sufficient in and of itself to conclude that the two products are in the same market, but it is certainly a factor that pushes one in the direction of saying that the two products are that — let me put it another way: that N.C.A.A. college football is not a relevant market, that it seems to be linked [926] to the prices of programming in general.

Q. Doctor Landes, could you explain for us what empirical study you did of advertising expenditures? A. Well, I did a study of the spots that were purchased by advertisers on N.C.A.A. programs, and then I looked at this set of advertisers — that is, those advertisers that purchased spots on N.C.A.A. programs — and I determined how many spots they purchased on other sports-type programs, and how many spots they purchased on programming in general.

The purpose of doing this, is this: if advertisers, which are the buyers in this market as I explained earlier, if advertisers have available to them substitutes, that is, if those advertisers that advertise on N.C.A.A. college football have available to them substitutes, then that would say you have got a set of buyers that can substitute across products. And you wouldn't want to define a market as limited to simply advertisers who

buy spots on N.C.A.A. football. Or putting it another way, a product market as N.C.A.A. college football.

Q. What did you use to study advertising in television in way of data source and so forth? A. Yes. Let me just — I think really, I want — I would like to explain a little bit more exactly the — if you would like some of the theoretical background to the study, because I think it's and important economic issue. And [927] from an economic standpoint, it strikes me as very relevant to the case.

And that is, we have identified the buyers in the market as advertisers. If you had, say, a group of advertisers that were specialized to some programming — some type of programming, for example, you had advertisers that were locked in and, specialized to college football, and that was the program under which they wanted to advertise their product, it was in effect an essential input for them in marketing their product, and then under some conditions one might say that the N.C.A.A. college football would constitute a relevant market, because it might be possible under those circumstances for the N.C.A.A., by restricting the number of games available, to reduce the number of viewers [to advertisers].

In effect, to thus set or lock in advertisement prices, and, therefore, raise the price to those advertisers.

And if you had a set of specialized advertisers, and it has to be, as I will explain shortly, a set of specialized advertisers that constitute a large share of the total advertising on N.C.A.A. football; if you had a specialized set of advertisers, it might be correct to define a market as limited to college football.

There is really one qualification I would like to make to that, and then a second subqualification.

The first is even if you have a set that are on — if [928] there are a number of advertisers that are also purchasing N.C.A.A. college football spots, but they are not specialized to

N.C.A.A. college football, those that are specialized are in effect protected from the exercise of market power by those that can substitute.

An example I frequently give in the antitrust class at the University of Chicago is dietetic soda. Suppose you had diabetics who could not substitute between dietetic and non-dietetic soda. So the diabetic is locked in, given the fact that he is going to be purchasing soda.

The fact that you have a set of customers that can't substitute between the two types of soda would not mean that dietetic or sugar-free soda was a relevant market, because there are a large number of other buyers of sugar-free soda that can, in the event of a price change or any attempt to restrict output of sugar-free sodas, those buyers that can substitute would shift to ordinary soda. And their ability to substitute is a bar for trying to exercise market power in the sale of dietetic soda.

So it is not just that you have a group of buyers that view the particular product as an essential, can't substitute away from it; those buyers constitute a large fraction of the total buyers of this product.

Second, still is the qualification to the specialized advertisers. Even if you had specialized advertisers because, say, the [929] N.C.A.A. was offering certain demographics that advertisers felt were necessary to market their product, it might be possible for other program suppliers, not those that produce program football, to produce programs that would have similar-type of demographic characteristics; and, therefore, even though you had this group that appeared to be specialized in the N.C.A.A. college football, that is a group of advertisers, if the N.C.A.A. were to try to restrict output and raise price to that group through limiting the number of games, that other program supplier would offer programs that were equivalent from the advertiser's standpoint.

That would be a supply side substitution example which would limit the exercise of market power.

Q. Doctor Landes, you have before you copies of Defendant's Exhibits ZB-four, ZB-five, ZB-six, and ZB-eight? A. Yes, I can certainly locate them.

Yes, I do.

Q. Doctor Landes, can you identify for us and explain to us what ZB-four is? A. Yes. I think before I do that, what I would like to do is briefly describe the data that were used here.

A computer tape was supplied to Lexecon by Broadcast Advertiser Reports, and they provided a computer tape to us which allowed us to identify every single spot that was sold on a network program, identify what program it was sold [930] on, who the advertiser was, and also B.A.R. has a product definition.

So it's not just advertisers, but you can look at products according to B.A.R.'s, product definitions, you can look at products and determine what products are advertised on what programs.

So what I did first to really get at this question of whether there appears to be a group of advertisers that are so specialized, so locked in to N.C.A.A. college football that they can't substitute away from college football in the event of a restriction in the number of games being shown on television, what I did was to identify those advertisers that advertise on N.C.A.A. college football.

And in table ZB-four, what you find is that for those advertisers that advertise on N.C.A.A. football on an advertiser basis, a little bit more than five percent of the network spots are on N.C.A.A. college football. And roughly twenty-four percent of their total spots purchased on network television are in sports programming.

And the overwhelming majority of their spots, seventy-five percent, are on nonsports programming.

If you do this on a product media that is not an advertiser media, for example Anheiser-Busch would be an advertiser.

On the other hand, on a product, it is broken down into Michelob and Budweiser. So you could get data for Michelob [931] and Budweiser separately.

What I find is on a product basis, of all the advertisers, and I think there are approximately a hundred and eighteen advertisers on a product basis, you find roughtly seven-and-a-half percent of the products advertised on N.C.A.A. football, roughly seven-and-a-half percent of those products are advertised on N.C.A.A. football, or thirty-four percent of those products advertised on N.C.A.A. football, or thirty-four percent of those advertisements, are on sports programming.

And again, the overwhelming majority, sixty-five percent, are on nonsports programming.

You just look at that table, it just hits you in the eye that, in fact, the advertisers that purchased time on N.C.A.A. college football are certainly not specialized to college football, nor do they appear to be specialized to sports programming in general.

Q. Doctor Landes, would you identify, please, Defendant's Exhibit ZB-eight? A. Yes, I have that here.

Q. Would you identify it? A. That ZB-eight lists — this is on a product basis, which I described the two bases before, product and advertiser. We list the products down here, these are all the products that are advertised on N.C.A.A. football in 1981.

The — for example, let's take American Express, which [932] is the first row. That's defined also as a product. American Express, less than one percent of their ads are on N.C.A.A. football. Less than one percent of their ads are on all sports. And roughly ninety-nine percent on their ads are nonsports programming.

Now, go to the second row. You have a different product for American Express, that's their Fireman's Fund, American Insurance. That product, sixty-seven percent of ads for that product are in N.C.A.A. football. Seventy-four percent on all sports. And twenty-five percent on nonsports.

And that would be the way to read this product.

Again, you can see Anheuser Busch, you can break it down into various types of beer, as well as Budweiser's art collection, which was apparently marketing some lithographs on N.C.A.A.

Q. Where did you obtain Defendant's ZB-eight? A. Where did we obtain the data?

Q. Yes. A. From the Broadcaster Advertiser Reports, Incorporated, which I believe is a well-known consulting and data-collection firm in the broadcasting area that is frequently — its reports are quoted in advertising magazines and broadcasting magazines.

They provided us with the tape, and then we actually made the computations from the tape, using computer facilities [933] at Lexecon.

Q. Is that computer tape the source of the data utilized in preparing Defendant's Exhibits ZB-four, -five, and -six? A. Yes. In other words, the basic data that goes into ZB-four, ZB-five, and ZB-six is from the appendices here. A convenient way, in fact, of again looking at the question whether there appears to be advertisers or a large fraction of advertisers that are specialized to college football programs is to look, say, at figure eight, where — what I have done in figure eight is to identify —

Q. Which exhibit is that? A. Excuse me, I'm sorry, ZB-five.

What I have done there is to identify the twenty largest advertisers, that is the twenty largest purchasers of spots on N.C.A.A. college football — the largest being General Motors. And you can see that less than ten percent of its networks spots are on N.C.A.A. college football.

The red gives you the percentage of the advertiser's spots on N.C.A.A. college football. The green area gives you the

percentage of all sports, other than college football. If you wanted to get the total for sports, you would add together the red and the green. So it's just the height of the green in ZB-five.

And then the blue area represents the proportion for [934] nonsports program.

And it's clear from looking at that table that here is a table constructed to pick out the largest advertisers on N.C.A.A. college football, shows that these advertisers have a wide variety of other programs in which to market their products.

Similarly, ZB-five — ZB-six, excuse me, is a similar computation in which it is done on a product basis. So instead of General Motors, now, we have — the first is Chevrolet autos. The second is General Motors, which refers to General Motors trucks. The third is Goodyear tires, Texaco, Schlitz, and then a separate product category called "Chevrolet trucks."

And you can just go down that and again the same pattern appears, that here are the largest, the products that — where you have the heaviest concentration of N.C.A.A. advertisers, and yet those products are marketed and advertised on a wide variety of other programs, sports programming, and even a wider variety of programming in addition to sports.

* * *

[935] Q. Doctor Landes, referring to the Defendant's Exhibit ZB-four, what do you conclude from that in that study was to whether college football is in a separate relevant product market on television? A. Well, again, I think if you look at the advertisers, you see they are not specialized to college football. Advertisers are the buyers in this market, and they have a wide variety of other programs in which they can reach their customers.

If you don't have this specialized locked-in group of buyers, then from that standpoint, you wouldn't define N.C.A.A. football as a separate product market.

But it's part of a broader programming market in which advertisers use not only N.C.A.A. college football, but substitute towards other types of programming for their advertisements.

Q. Doctor Landes, from Defendant's Exhibit ZB-four, do you draw any conclusion as to whether, even a market consisting of all sports television programming, is a separate relevant products market? A. I think that table four is very suggestive along those lines, and that is that sports programming to advertisers, [936] again the buyers in this market, sports programming in and of itself is not a special market, because you have all of the advertisers that are advertising on sports programming, yet they seem to be advertising a larger fraction or a larger fraction of their spots are purchased on nonsports programming, suggesting that there is substitution between sports and other types of programs for advertisers.

And coming back to the way we discussed the market definition before, with two substitutes, you want to include them in the same market, which would suggest that the programming market is broader than just sports.

Q. Doctor Landes, what do you conclude from Defendant's Exhibit ZB-five with respect to whether television of college football is in a separate product market? A. Again, it's the same conclusion, looking at ZB-five, you have got the largest advertisers on N.C.A.A. college football. If anything, that would tend to overstate the importance of advertising on N.C.A.A. college football; it shows that those advertisers advertise not just on college football, but all sports and programming in general.

And even for those advertisers, there seems to be programs that go beyond sports which are substitutable in terms of reaching potential customers.

So again, looking at ZB-five and ZB-six, one would have to conclude that the market was broader than just all sports [937] programming. It would include a great deal of other programming.

Q. Doctor Landes, in referring to Defendant's Exhibit ZB-six, do you have a conclusion based upon that study as to whether — as to whether college football television is in a separate relevant product market?

A. Yes. I think it's the same conclusion as before, that these advertisers — this is on a product method — are not specialized to college football. They don't appear to be specialized to sports programming. The market definition in terms of including products or programs that are good substitutes for one another from the standpoint of the advertiser is broader than sports programming.

Q. Doctor Landes, the plaintiffs allege in this lawsuit that the relevant product market here is simply college football television. You have said that's wrong, and that it's much too narrow.

Suppose, hypothetically, that the relevant market were as narrow, however, as all sports on television; did you perform a study to determine if college football would have market power — A. Yes.

Q. — in such a market consisting of all sports on television? A. Yes. I did, although I want to emphasize that I [938] don't believe the market should be limited to sports programming.

Q. Did you compile a table summarizing that? A. Yes, and that's referred to as Defendant's Exhibit ZB-seven, which uses the Nielson data, examines three markets, Chicago — three geographical areas, Chicago, Los Angeles, and New York, each for two years, 1980 and 1981, for two time periods, October and November.

And what that does is in each of those markets, what we have done, again using a Nielson tape that was provided to us, we computed the, for example, broadcast time that was N.C.A.A. college football. So we limited it to those — to that time period in which college football is shown, and you can see the numbers there are roughly between ten and fourteen percent of sports broadcasting time during this two-month period, is N.C.A.A. college football.

If you make an adjustment for the size of the audience, and that is, you basically weight these quarter-hours of programming, by the audience size as given in the Nielson reports, you find that N.C.A.A. college sports on a viewer basis.

Now, computing its share, not an hourly basis but on a viewership of sports programming in general, that share is somewhere between seven and twelve percent.

If, in addition, you go a step further and say — well, [939] let me look at a particular demographic group of males aged eighteen to forty-nine, which are, if you like, sports viewers — you find that again in terms of a share of those viewers during the two-month period, October-November, for these three geographic areas in two years, you find that the N.C.A.A.'s share is somewhere between seven and twelve percent.

These share numbers are far too low, even if you had a sports program market, to infer that the N.C.A.A. has market power.

But in addition, I think the share numbers, themselves, even limited to a sports programming market, are somewhat misleading, because what it ignores is the possible — even if they are just — if we have limited it, and taking your hypothetical, limiting it to sports broadcasting, it overlooks the possibility that advertisers can substitute across time periods.

Of course, in the month of October, when you have a particularly heavy concentration of college football, but these

advertisers advertising on sports programs can advertise in September, December, January, and they will make — they will substitute across these different time periods into time periods in which you have less college football.

So that if anything these numbers would overstate the N.C.A.A.'s share, if you limited the market just to sports programming.

I just might add one more thing. It also does not strike [940] me as meaningful to narrow things to say there is a separate sports programming market on Saturday, or separate sports programming on Friday, or separate sports programming market on Monday night, because, again, advertisers can substitute across days of the week.

It's as if one said that there is a spearate market for automobiles sold on Saturday, as there is for automobiles sold on Wednesday. It's clear that it would be ridiculous that if you wanted to find separate automobile markets by the day of the week that automobiles are sold, because consumers can substitute across different days of the week.

And, similarly, here advertisers can substitute across different time periods.

Q. Doctor Landes, has the summary to which you have been referring as the N.C.A.A.'s share of the sports broadcasting market, been identified as Defendant's Exhibit ZB-seven?

A. Yes, it has.

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[941] Q. Doctor Landes, what do you conclude from this entire series of empirical studies that you performed and described this afternoon, as to what is the proper, relevant product market in this case?

A. Well, it is certainly not college football. I think that the evidence is quite compelling that the market is broader than

college football. It's, I also think, broader than all sports programming on the basis, really, of the ability of advertisers to substitute across programs not limited just to substitution cross sports programming.

So that I would conclude that the N.C.A.A.'s market share in a relevant market, which is going to be a market broader than sports programming, is going to be too low to infer that the N.C.A.A. has an ability to restrict output, or raise price.

In short, I would conclude that the N.C.A.A. lacks power in a programming market.

Q. Let's turn at this point, Doctor Landes, away from the market power questions, and focus on whether the N.C.A.A.'s football television controls effect in-stadium attendance at college football games.

* * *

[953] *Direct Examination Continued by Mr. Andrews:*

Q. Doctor Landes, after we left the courtroom last evening, did you discover an error in one of your graphics, Defendant's Exhibit ZB-two? A. Yes, I did.

Q. Could you explain what that error was? A. ZB-two, which is figure six, which is an index of N.C.A.A. contract prices per game versus an estimate of the program and technical expenses of the networks and television stations, what happened with that graph was that although when it was in black and white, that is no — we didn't use color graphics, the figures were correct. When we used color [954] graphics, we reversed the figures so what it should read at the bottom on the note would be that the index of N.C.A.A. contract price is in blue, and not as noted in the ZB-two, red, and the index of the program and technical expenses is in red, rather than in blue.

Basically, the two curves are reversed, so it is clear, it doesn't matter at all to the conclusion one draws from these

figures, because what one is concerned with is the movement of the figures and the fact that they move closely together during this period.

So it really doesn't matter which one happens to be labeled N.C.A.A. contract price per game and which one network T.V. station expenses.

Q. Doctor Landes, have you made a study of the effect of televising college football games on in-stadium football attendance? A. Yes, I have.

Q. What did you find as a result of that study? A. I think the broad conclusion would be that there is an adverse effect of television — televised college football on attendance at college football games —

Q. How did you — go ahead. A. — in the sense that when you have more games televised on a Saturday, that tends, other things the same, to reduce slightly attendance at football games.

[955] Q. Doctor Landes, how did you reach that conclusion? A. I did a detailed multiple regression analysis or econometric study involving a number of schools, approximately—I think thirty-one schools in the Oklahoma and Georgia area, including both Georgia and Oklahoma, and I examined the attendance pattern of those schools over a five-year period, from 1977 through 1981.

Q. But before I ask you how you performed your regression analysis, are what have been identified as Defendant's Exhibits ZB-nine through ZB-thirteen inclusive, the materials which describe the regression study which you performed? A. Yes.

Q. Doctor Landes, would you describe briefly for the Court, please, the documents which have been identified as Defendant's Exhibits ZB-nine through ZB-thirteen? A. ZB-nine is a list of the colleges and universities in the sample.

ZB-ten is a list of the variables used in the regression analysis, including definitions or descriptions of those variables.

ZB-eleven contains the results of regression analysis for the entire sample.

ZB-twelve contains the regression analysis for a subsample, which is those schools in division one A and one double.

And then ZB-thirteen contains the results — regression [956] results for subsample of division two and three schools.

* * *

[957] Q. Doctor Landes, in this case, how did you perform an empirical analysis of the effect of the television on the attendance at college football games? A. Well, I indicated to begin with, what the sample was. The sample being the schools in and around Georgia and Oklahoma, which gave us thirty-one schools. The unit of observation was an individual home game at one of these schools which if you look over a five-year period and thirty-one schools, you have approximately a hundred and fifty home games a year, times five, or roughly seven hundred and fifty separate observations in the sample. The problem, however, with trying to explain what effect television has on attendance is really how does — how does a researcher go about this, when you know that on virtually every day that a college football game is played, there is a college football game on being — being televised.

So it is not a straightforward obvious easy way in which [958] one tests the effect of the television. It's not, for example, as N.O.R.C. was able to do in their studies in 1952 and 1953, where you had wide variations across the country with television penetration showed some parts of the country where the fraction of the television was low and other parts of the country where it was modest, and the parts of the country where the proportion of households that had television was higher.

So the advantage of a period like that is almost of a controlled experience because you can examine attendance patterns across areas where you can distinguish the areas on the basis of the extent to which television has penetrated.

So I thought the N.O.R.C. studies in the Fifties were actually quite sophisticated and very clever, and what was done principally in the study was to look at a benchmark, 1947-48 attendance, but not just to say, "Did attendance go up after '47 and '48, or did it go down after '47 and '48?" That, in and of itself, wouldn't be particularly meaningful since there could be other factors affecting attendance during that period.

But what the N.O.R.C. study did was to divide the country up into areas in which television had penetrated at a more extensive — and compared that to areas in which — into which television had made—had lower rate of penetration, so you were able to distinguish among areas, and what was interesting was that although the aggregate attendance fell in, I think, [959] '50 to '51, compared to the earlier period, when you divided the country in this way, you found in those areas in which television had not penetrated very much, what you found, was that attendance had actually increased relative to the base, those areas in '47 and '48, were as in those areas in which television had penetrated extensively, attendance had actually fallen.

So I thought that given at the time it was done, before high-speed computers and so on, it was a rather clever way to attempt to distinguish what the effects were of television.

The problem, as you can see, with doing a study like that today is television is so wide spread in the United States, that you really can't distinguish across areas or across countries on the basis of the fraction of households, let's say, that have television, because virtually every household has a television.

So what I did was to distinguish those days in which a doubleheader was televised on which you had two college football games televised, compared to those days on which you

only had a single game televised, on the theory that — televised college football has an adverse effect on attendance what one would suspect is on a day when there was more college football televised, there would be a slightly bigger or larger adverse effect on attendance.

I think the way we have done it would probably understate [960] the effect of televised football, that if there is a game on, someone is likely to stay home, and the marginal incremental effect of having a second game on is slight.

But the way we studied it and I think the only way one can study it at this point in time is to make a distinction between days on which you have two games or a doubleheader, compared to days in which you have a single game.

What I next did was to identify variables that are likely also to influence attendance, because again, there are clearly other facts than television that are going to have an effect on attendance. You have such variables as the quality of the team, whether the game, say, is between two teams in a state because presumably that would reduce the transportation costs of attending an away game and, therefore, should increase probably the interest in attendance at a stadium; whether a game was a homecoming game or not should have an effect independent of whether the — independent of the number of games being televised; possibly where a game is a night game or day game; the weather. And in addition to that, there may be specific factors for each school in our sample due to differences in enrollment or intensity of interest in football or the size of the football stadium.

So what I did in the regression analysis was to put those variables, what I call the independent variables, they are your right-hand variables and your variables to attempt — [961] what you are using to explain variations in attendance rate in the sample that I described and, in addition, produce a variable in the analysis which would be on, whether or not on the

particular day that we are looking, the attendance for a team, whether there was two games on television or a single game on television.

What I found, I think, can be most easily described by referring to the exhibits, the first one being ZB-eleven.

And in ZB-eleven, it refers to our complete sample which is seven hundred twenty-eight observations, and if you look down, you will see a variable name called "header," and header is a variable that basically takes the value one, if there is two games on television, and zero if there is just a single game on television.

The interpretation of that coefficient is that an increase on any given day from one to two games on television has the effect of reducing an average in our sample attendance at the schools we were focusing on, by approximately four percent, because the dependent variable attendance is in logarithmic form, so that the coefficient here would be interpreted as a percentage change in attendance when you increase the number of games from two to one.

You will notice next to header is something that is called the "T-statistic." The T-statistic is a way of measuring the statistical significance of the variable in [962] question, and that is even though one estimates a coefficient, it is possible that the coefficient — the positive or negative coefficient that one observes could be due to chance because this is a statistical study, and the T-statistic of one point twenty-nine under the assumption that what we are testing is that the model says there should be a negative effect on attendance, a T-statistic of one point nine is approximately a level of significance of ten percent, which would be described as saying there is a nine in ten chance that the effect of the second game on — second televised game on attendance is negative, and there's one in ten chance that it is not significantly different than zero.

If you notice, if you went through the other variables in the equation, they seem to come out roughly the direction that one might expect; the interstate games have a positive significant effect; homecoming tends to increase attendance; a night game seems to increase attendance by approximately fourteen percent.

We also have a variable called "televised," which is not significant, and that is whether or not the particular game was televised. That is, for example, we have in our sample a number of Oklahoma games, and the televised variable would take a value one, when Oklahoma was being televised that week, and what we observed there is actually a positive effect, which indicates that when a game is televised — when a game is [963] televised, when that — let me put it another way, when a particular game is televised, attendance at that game tends to be higher.

I think that's because when a game is televised, the criterion for selecting a game to be televised would be a game that is of special interest and, therefore, would be one that would attract fans, so that televised is probably a proxy variable for the quality of the game.

We also had a number of year variables in there to hold constant the effect of years, and a set of school specific variables which are the various school variables listed, which is a way of holding constant factors that are specific to each of the schools in the sample.

If you turn to the next two tables, ZB-twelve and ZB-thirteen; ZB-twelve refers to division one and one double A; and ZB-thirteen is division two and three.

What you notice is the doubleheader variable still has a negative effect in ZB-twelve; that is, on division one and two schools, although smaller, it's only a two-percent effect, although the levels have significant drops, whereas if you turn to ZB-twelve, you will see that when we split the sample, the principal effect of televising a second game on a Saturday is to

reduce attendance at the division one and three schools. There the coefficient on doubleheader is approximately ten percent, indicating when there is a second game on a Saturday, [964] attendance drops by approximately ten percent.

Q. Doctor Landes, you testified that you had concluded that television and college football is not a relevant market and that the N.C.A.A. lacks power with respect to its televising of college football games in the relevant product market. Have you now reached — or have you in the past reached a conclusion as to the proper relevant market with respect to product in this case? A. I think it's very difficult for an economist to be precise about the exact contours of a product market because one product tends to merge and overlap with other products. But if you looked at an all-programming, all-advertiser-supported program market, it is clear, if you look at that programming market as a relevant market, the N.C.A.A.'s market share would be negligible, certainly far too low to infer any market power.

It's not clear that that advertising-supported programming market is the full and complete market that one wants to look at because advertisers also substitute outside of the television media into other media, and they advertise on radio, they sometimes advertise on — in magazines, newspapers and so on, so there are a variety of substitute media of reaching consumers.

So in one sense, it might be even broader than an all-programming or all-advertiser-supported programming market. On the other hand, there might be some advertiser-supported [965] programs on television that one would not include in the market; you might not include if certain religious programs were advertiser-supported or some other types of programs.

On the other hand, if you go in the reverse direction and limit the product market simply to all sports programming, I think that's far too narrow a product market, but even if you

were to limit the relevant market to all sports programs, our study clearly shows that the N.C.A.A.'s share of that market is again far too small, somewhere in the order of ten percent, based on just a two-month period, to infer that the N.C.A.A. has market power.

Q. Doctor Landes, do you believe that the N.C.A.A.'s package sale of broadcast network television rights to its football games and those of its members and the related television controls of the N.C.A.A. constitute a price-fixing agreement? A. No, I don't.

Q. Why not? A. Because it goes — it, in part, goes back to the question of the effect — the fact that the N.C.A.A. is selling its programming in a highly competitive market and, therefore, is unable to exercise market power to restrict output in that programming where the buyers are advertisers, it is unable to restrict output and raise price in that market. So that one wouldn't characterize it as a price-fixing agreement, [966] particularly when you have got other factors in terms of possible increases in output, in terms of in-stadium attendance, which as I have indicated, we have done a study of in-stadium attendance and found a positive — an effect of television, an adverse effect of television on in-stadium attendance.

When you put that together with the effect of — with the fact that there is a highly competitive programming market in which the N.C.A.A. sells its package, you have to conclude that you couldn't characterize this agreement as a price-fixing agreement.

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[967] *Cross Examination by Mr. Muchmore:*

Q. Doctor Landes, do I understand you to be saying that as an economist, anyway, views the question of price-fixing, [968] that we cannot have price-fixing unless we also have market power, is that correct? A. I would say that you could

have price-fixing, you could have price-fixing without market power. The effect of a price-fixing agreement without market power might be negligible.

Q. Well, then, perhaps I should have said, an economist is not concerned about price-fixing unless it is a common need by market power, so that it can have the power of restricting output and bringing about these allocative deadweight problems that you referred to? A. I think the principal objection to price-fixing is the output restriction and allocative losses, yes, that's correct.

Q. So you can have price-fixing, but it is not objectionable, at least to an economist, is that correct? A. Well, I wouldn't quite put it that way. If you had a clandestine meeting among a group of competitors, that they met in smoke-filled hotel room and agreed to fix prices and cut back output, there certainly would be no social purpose in encouraging such an arrangement. I think it's quite proper in that instance, just to call that price-fixing because the only possible purpose of such an arrangement would be to restrict output and raise price. It may turn out that, in effect, the agreement is ineffective, but the only only purpose [969] there was to restrict output and raise price.

On the other hand, if you get a case such as A.S.C.A.P., which to some people they may view that as literal price-fixing, I think one has to go beyond and characterize exactly what the agreement is; whether it has an effect as in the A.S.C.A.P. case, of actually expanding output, and I think you have the same problem here with the N.C.A.A.; you have to characterize and look at the full agreement to determine whether it has an adverse effect on output in a particular market; whether it has a beneficial effect, say, in a market such as in-stadium attendance.

Q. Doctor Landes, are you making a determination on whether or not something is price-fixing, based on whether the meeting is in secret or not, is that a determinative factor or not? A. No, that's not a determinative factor, but —

Q. I don't understand your testimony that the determinative factor is whether there is power to restrict output. A. Yes, except there are some agreements, such as the example I gave yesterday, say, where lawyers may agree to divide up the revenues to set up a law firm or a group of entertainers may agree to put on a series of programs and divide up the revenues, I would not call that price-fixing, it has no effect on output.

Q. Isn't that what I just asked you, that you don't [970] consider it price-fixing because it doesn't have an effect on output, isn't that precisely what I just asked? A. I don't consider those agreements price-fixing because they do not have an effect on output.

Q. Right. We get back to the question, aren't you saying that the determinative factor, whether something is determined by an economist as price-fixing, is whether it restricts output? A. If you define output sufficiently broad, yes.

Q. All right, sir. So even though you might have a situation in which persons would get together and fix prices in the literal sense, if there is not the market control to allow them to restrict output, an economist doesn't consider that price-fixing? A. I don't think — maybe I misinterpreted, but I don't think I was going quite that far. If the only conceivable effect of these firms getting together is to restrict output and raise price, that's when I would call that price-fixing. It's just a simple shorthand way to describe an area of activity among firms that we would like to discourage.

* * *

[972] Q. Doctor Landes, do you agree or not agree that since one cannot restrict output in a manner that will affect prices unless he has market control, and that since you do not deem it price-fixing in a sense that is objectionable to an economist unless you can so restrict output, that it follows that without market control, there will not be price-fixing, at least in the

sense that you say an economist objects to it? A. I can answer that, yes, with qualification —

Q. All right A. — that I would be happy to explain.

Q. Let's hear the qualification. A. And that is, there would be some instances where an economist would — let me try to go back.

That in certain instances, the only conceivable effect of an agreement to fix prices would be one which was adverse to consumers; that it would be an output restricting agreement [973] which would tend to produce what I call an allocative or deadweight loss.

It may be in that instance that the firms, although they do get together and agree on what they are going to do, somehow they fail because they don't anticipate that other firms are able to expand their output in a sufficiently short period of time, so that the price-fixing or cartel agreement falls apart.

I would have no trouble calling that price-fixing; what I would have trouble calling price-fixing is something like A.S.C.A.P., where one might say that in a literal sense the people had agreed, the composers and performers had agreed not to compete in the licensing of performance rights with themselves; with respect to price, but yet the way to characterize the arrangement there was that it was an output enhancing arrangement that saved transactions' costs, that increased the number of performances.

And similarly with the N.C.A.A., I wouldn't characterize what is done here as price-fixing. This is simply a program that is being sold in a market in which there are lots of programs, so it's a competitive programming market, and in addition the controls are likely to have an effect on enhancing in-stadium attendance.

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[976] Q. Haven't you been testifying and didn't you answer my question with minor reservation that there must be market control before there is price-fixing, in your opinion? A. Well, there must be market control for a price-fixing agreement to be an effective price-fixing agreement. I don't think I would have a problem calling an agreement a price-fixing agreement, if the purpose of the agreement was to restrict output and raise price.

Q. All right. That's an attempted price-fixing agreement, then, all right. But you are not going to say that it doesn't make any difference whether there's market control because the whole import of your testimony yesterday was that market control is one of the key elements in determining price-fixing, isn't that a fair statement? A. Well — but it was — the question is really whether you want to characterize. Before you even get to the stage of saying, "This is a price-fixing agreement," you have to decide whether you are going to characterize some arrangement as a price-fixing agreement.

[977] Q. And one of the first things that — and perhaps the main thing you looked at in making that determination was whether there was market control, isn't that right? A. Yes, I did.

Q. So you can't say it doesn't make any difference whether there's market control, can you? A. I don't think I said it makes no difference if there's marketing control. I think what I — the thrust of what I have been trying to say is that for some price-fixing arrangements, an economist would have no problem calling it a price-fixing agreement, if the only conceivable purpose was to restrict output and raise price.

It may turn out that it is going to be an ineffective agreement.

Q. We are back to the unsuccessful attempt to fix prices, right? A. Yes, but there's no point in encouraging — in encouraging price-fixing by not, say, penalizing an unsuccessful attempt to fix prices.

Q. Putting aside unsuccessful attempt, is it not a fair characterization of your testimony yesterday, that one of the key determinations that you have to make in determining whether you have price-fixing is whether there's market control? Wasn't that one of the main thrusts of your testimony yesterday? A. That I wouldn't — yes, yesterday, that I wouldn't [978] characterize the N.C.A.A. arrangement as price-fixing, because, in part, it has no market control.

Q. You know, of course, who I'm quoting when I ask you if your agreement with the statement that it makes no difference whether the participants possess market control? A. I — could I see what you are quoting?

Q. Well —

THE COURT: I don't think that's a fair question, why don't you show it to him.

MR. MUCHMORE: Certainly, I would be delighted to. I simply asked him if he was familiar with it.

THE COURT: He doesn't know what you are referring to, Mr. Muchmore.

MR. MUCHMORE: I'm referring to what the United States Supreme Court said in *United States of America v. McKesson and Robins-*

Q. Are you familiar with that case? A. No, I'm not familiar with that case.

Q. All right, sir.

Doctor Landes, are you willing to say or are you not willing to say what you do consider to be the relevant market that controlling football sports is part of, and I would appreciate a "yes" or "no" answer, as to whether you are or are not willing to state what you do consider to be that relevant market?

[979] A. I thought I gave the answer on the direct testimony.

Q. Well, I had the impression that you told us both yesterday and today, that it was not. Now, are you willing to say — to express an opinion as to what it is? A. I would like really to go with the statement I made at the direct testimony; that it's broader than sports advertising; that it's difficult to give a precise contour on the market; that it may be broader than all advertisers — sponsored programming, but however narrowly one is to conceive it along those grounds, the N.C.A.A.'s share is too small to warrant an inference that it has market power.

Q. Are you saying, Doctor Landes, that you are not willing to express an opinion as to what the relevant market here is? A. Well, if I had to pick out a particular relevant market, I would say it would be advertiser-supported programming.

Q. On television? A. On network television or television, yes.

Q. Despite the fact that that's substitutable for other kinds of advertising? A. I think it is, I think if you are asking me to pick out a particular market definition, the best one I can think of here, I would go with that, even though I'm going to come back, and if you ask me and qualify it and say, in some instances, it's probably broader than that because it [980] includes substitution towards other media and there might be some programs that don't really fit into this category.

But if I have to come up with a best relevant market, I'm going to say, advertiser-supported programming.

Q. Well, sir, I didn't mean to indicate that you have to do that, I simply asked you if you were willing to? A. Well, I'm willing to, subject to the qualification.

Q. All right. Now, your testimony is, then, that not even all sports constitute the relevant market on television. That is a correct statement, is it not? A. Yes.

Q. And what that means is that not even the control of all sports would entitle someone to restrict output, control prices and have an allocative or deadweight effect, is that correct? A. That's false.

Q. Your testimony then is that if one controlled all sports, one could successfully restrict output and raise prices? A. Well —

Q. And bring about this allocative deadweight effect? A. The market share — if you say that there is a broad market, say, all programming or even if you exclude some programming from that, the sports' share of that market certainly is going to be sufficiently large, the all-sports share, to warrant an inference that if all sports got together [981] they could very well restrict output and raise prices.

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[989] Q. What is the marginal cost of production of — to Oklahoma or Appalachian State of a television broadcast of a football game that they happen to be playing? A. I find it very difficult to identify what is marginal costs when we're talking about televised college football. To me, it's some ways analogous to saying what we mean by the marginal cost of a book. We would have to spend a good deal of costs to develop and write a book, and certainly books are sold at prices of ten, twenty dollars, and yet the actual additional cost of printing the book might be ten cents or twenty cents.

[990] If you had a fuller definition of marginal cost, it would tend to incorporate into the cost definition, the costs of creating and developing the book, and the same way in college football, when you look at the cost of televising college football to the teams, you have a package on the one hand that yields revenue and you have the cost of developing an attractive product for the network, and it's very hard for me to identify precisely what that cost is, because to the extent there are revenues, people are going to spend real resources to make the games more attractive, and that would be part of the marginal or incremental cost of having games televised on television.

Q. Now, when publishing a book, we publish it for the purpose of selling all those copies, including the last ones that were so cheap to produce, isn't that right? A. Yes, but you

certainly wouldn't want to sell them all at the cost of producing an additional book.

Q. I understand that, but the purpose of publishing the book is to sell all the copies? A. That's right.

Q. Now, these teams played football before we had television, didn't they? A. Yes, they did.

Q. If football and television were banned entirely next year — O.U. would go ahead and play its schedule? [991] A. Yes, although in the longer periods of time, the effects of absence of television revenues might reduce the quality of games and expenditures to promote and create a valuable product.

Q. I understand that, but — A. And those costs somehow should be attributed or allocated to the chore of getting games televised.

Q. Well, we would go ahead and play the fall schedule, television or not television, would we not? A. I assume next year, you would, yes.

Q. Isn't what you say, it's very difficult to even find a marginal cost for a college football television production? A. I think that's true, yes, it's joint cost, combined with the entire cost of producing football.

Q. If the entire cost of producing football is there, whether you are televising it or not, is it not? A. But I think that mischaracterized what I was saying before; since the part of the cost of a football game is the cost of developing an attractive product for poeple to see. And one has an incentive because of the revenues to be obtained from television to develop a more attractive package to the extent you are spending resources to develop a more attractive package, that's an additional cost to be attributable to televising college football games.

[992] Q. All of that is an elaborate way of trying to explain why we charge anything for televising these games, isn't it? A. It explains it, yes.

Q. Well, when an economist first looks at it, he says, "They don't have to pay anything for the televising of it," and their marginal cost is zero, isn't that right? A. Yes, but I think that's a very mechanical way of looking at a complicated problem.

Q. But actually you think the marginal cost for a game may be as high as a million dollars or more? A. I can't identify precisely what the marginal cost is because, as I say, it's the cost of developing a more attractive package for television, it's difficult for me to identify what that cost is.

Q. But you don't have any problem in saying that the marginal cost of televising a game or not televising it, just playing it, the cost, marginal cost, may be more than a million dollars? A. I just don't know.

Q. That would not be beyond what you consider reasonable for it to be, though? A. Well — but the way I am looking at marginal cost, I think is in a slightly different way than you are. I'm looking on the one hand, what the — a package of programs [993] like almost equivalent to something like "Laverne and Shirley," a series of programs produced which we call college football. There is a cost of developing that package, so that's an attractive package to the networks to be broadcast, and one wants to attribute to televising that package those costs that are incurred, but for the possibility of getting these football games televised.

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Q. Looking at marginal cost the way you look at it, not the way I look at it, are you saying that the marginal cost [994] of televising the Appalachian State-Citadel game; that is, the cost to those two schools, may have been as high as eight hundred eighty-four thousand dollars? A. I don't think so, I don't think I was saying that, and I don't think it's probably — I think the cost is probably lower than that for those two schools.

Q. What do we have when we have a product being sold at higher than its marginal cost? A. But you are asking a different question, and the question — you are putting it in a way differently than I'm trying to put it.

Once it's been decided that the Appalachian State game is going to be televised and the game would have been played, anyway, anyway, we can all agree, I think you and I will agree, that the cost of actually getting that game televised once the game — we know it's going to be played and so forth, is going to be zero, close to zero. Right?

But what I was asking — what I was looking at, is that there is a — there are revenues, there are prices from producing a network series of college football, and there are going to be costs attributable to the universities in the aggregate from creating a more attractive product, so they get additional and greater revenues from college football.

Q. And in the case of Appalachian State-Citadel, are you willing to assume that's reasonable, that their costs [995] in developing their product for television may have been eight hundred eighty-four thousand dollars in the broadest sense that you have used the phrase? A. Well, for that particular school, probably not, but you may have a number of schools that are competing to get on television, only one is selected, and when you aggregate up the expenditures of all of the schools that are trying to get on television to obtain that eight hundred and eighty-four thousand, that is what makes their games somewhat more attractive, it's quite possible that the cost could be in the aggregate eight hundred thousand, although I doubt it would be eight hundred thousand for the two schools.

Q. And, of course, if you can't just — you can't justify the cost, the marginal cost of that game being eight hundred eighty-four thousand dollars, then you would be looking at a price above marginal cost, wouldn't you?

A. Well, except that the price that I look at in this market is the price for the package. I mean, you're asking — again, it comes back — take series of programs —

Q. Well — A. — like "Laverne and Shirley Show," or something, which has a package of programs, there is a price for that package, and I don't know how that price is divided up among the actors on different programs, and so forth — on different episodes of this series.

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[997] Q. Excuse me, Doctor Landes, I don't think we are communicating, because there can't be a debate over the definition of marginal cost, because in my question, I said define it however you want, if marginal cost defined the way you, Doctor Landes, wanted to define it here, without debate, if that marginal cost is not two hundred sixty-three million dollars, then there's evidence of market power? A. Well — but there may be economic rents, an economist would refer to economic rents received by the N.C.A.A. But at the margin, it may be that the additional expenditures in the aggregate that are paid to make programs, college football more attractive, is just balanced off by the price that these programs are right- — that a somewhat more attractive program package is able to obtain in the market.

Q. You are refusing to accept my assumption, are you not, when I say it may be that the marginal cost is that high, my question — A. No, but —

Q. Go ahead. A. The — let me put it this way — the cost of the programmings over the next few years may be, let's say, twenty [998] million dollars, and the aggregate revenue, a hundred and thirty million dollars, so there is a hundred and ten million dollars over and above the total cost, yet at the margin, the teams in the aggregate may be spending additional dollars that just balance off at the margin, the additional price that could be obtained from this more attractive package.

That is what you would have — would be a program that receives economic rents.

I mean, you have — in the syndicated programming market, you have many programs that have already been created

on networks, and they are now in reruns, such as a program like "M.A.S.H." Everyone who has examined the syndicated programming market or network programming concludes it's a highly competitive market, that people are struggling to get their programs picked up on television.

Yet many of these programs earn revenues far in excess of the literal costs of getting the program televised because a lot of those costs have already been incurred, and yet one wouldn't say from that, that these program producers are receiving — are monopolies, it's simply they are receiving economic rent.

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[1000] Q. Of course, the advertisers, their demand is derived from the viewers? A. Basically from the viewers, with some adjustment for demographic characteristics of the viewers.

Q. And when we say to them, viewers are fungible, that goes back really to our point, that the N.C.A.A. can no more raise the price of college football television than an individual farmer can raise the price of wheat by holding back his production? A. Yes, it does.

Q. You used exactly that example in your report, did you not? A. Yes, I did.

Q. That if wheat is selling at ninety cents and one farmer says, "I'm going to hold back my wheat and sell it for a dollar," he's trying to fix prices, but it doesn't do him any good because he doesn't have market power because wheat is wheat, is that right? A. That's right.

Q. And essentially you're saying that that's the same situation we have here, the N.C.A.A. says, "We will"—even [1001] if they say, "We are going to hold back our product and televise less of it," rating points are rating points and, therefore, they cannot affect the price that they receive for it? A. If they receive per game, based on advertisers, what advertisers are willing to pay for viewers, basically they are competing in a broad—their programs are competing in a broad market with

other programs, and cannot by restricting the number of games televised, really have any influence on the price that advertisers pay.

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[1002] Q. Let me be more specific. If the N.C.A.A. were to have tendered to A.B.C. and C.B.S. a contract which is identical to the one that they have now, except that instead of having the television plan that restricted other games, they — told A.B.C. and C.B.S. — you have your pick of the games and you do it under the two rule — network ground rules, but any other game that any school wants to televise, they can sell it to KOKH T.V., to N.B.C., to whomever they wish, and all the other games that you don't want can be televised, it's your testimony that the value of that contract with A.B.C./C.B.S. would still be just as high? A. No, because I think some viewers might be diverted from the A.B.C./C.B.S. to other programs, there needn't be any aggregate significant change in the total number of viewers, when you have these additional programs televised.

But with diversion of viewers from one station to another station, there certainly is going to be a reduced value to a particular station from acquiring the program.

Q. Let me see if I understand that. A.B.C. and C.B.S. are or should be willing to pay more for the contract because [1003] of the other restrictions on the output of football games, is that right, or not?

A. Basically what A.B.C. and C.B.S. are willing to pay for college football depends on the number of viewers each station anticipates to watch the football games that the station is broadcasting, and if you have an additional station that is picking up games at the same time, then what will happen is some of the audience will be diverted from A.B.C. and C.B.S. and, therefore, the amount that A.B.C. or C.B.S. would be willing to pay for a game would be less primarily because it has

fewer viewers although maybe on a price per viewer basis, there would be no change.

Q. Let's not get into the reasons right now, may I please have an answer to my question? Are you saying that the price per game that the N.C.A.A. is receiving under the A.B.C./C.B.S. contract is enhanced by the fact that they are restricting the output of other games to other stations or not? A. I would think that the price per game, not per viewer price per game, is—

Q. That was my question.

And, therefore, it follows that the total price of the package from A.B.C. and C.B.S. is higher because the N.C.A.A. has its rules restricting the output of other games, is that correct or not?

[1004] A. If what it does by restricting the output of other games is shift viewers that would have watched those other games to A.B.C. or C.B.S., it's going to increase the number of viewers on A.B.C. and C.B.S., and if it does that, A.B.C. and C.B.S. are going to be willing to pay more because they have more viewers, and advertisers are willing to pay basically for viewers, so it would increase the program price per game.

Q. I think you are explaining why, Doctor Landes, and I have no objection to that, but first I would like an answer to what—are you not saying that the exclusive nature of these contracts, the restriction on the output of other football television games on a given Saturday afternoon does raise the price per game that A.B.C. and C.B.S. are willing to pay? A. Yes, and I say, yes, subject to the qualification that the restriction enhances the audience of A.B.C. and C.B.S.

Q. What you are saying is, yes, so long as there are viewers who watch the A.B.C./C.B.S. games that may have watched another game if it were available? A. Yes.

Q. For instance, A.B.C. and C.B.S. are broadcasting Michigan State and KOKH is showing Iowa State, so far as we assume that there are some viewers in Oklahoma that would [1005] like to watch Oklahoma and Iowa State, even restricting them from televising that game, it has enhanced the amount of money that it can receive for the Michigan—Michigan State game, is that not correct? A. Could I get that read back? It was a rather long, lengthy question.

MR. MUCHMORE: Let's all listen to it again, then.

(THEREUPON, the record was read back by the reporter.)

A. Assuming, yes, to the extent that those viewers who would have been watching Iowa and Oklahoma State are diverted to the network viewers —

Q. Excuse me, that was the assumption of the question, that there were such key viewers. A. Yes.

Q. That being the assumption in the question, the answer to the question is, yes? A. Yes.

Q. And the reason that that price can be so enhanced is it not because Oklahoma, Iowa State, Michigan State and all the others are members of the N.C.A.A. and follow its rules as to what games can be televised and what games cannot? A. Yes.

Q. In other words, they have combined together these competitors and agreed to restrict the output, is that not right? [1006] A. They have combined to restrict the number of games that are on television. Now, as I have indicated in my direct testimony, I didn't view football as a distinct product market, that they weren't able to affect output in a relevant market, which is the price that advertisers are willing to pay for programs.

Q. But your conclusion that they can't restrict output was because they couldn't affect prices, wasn't it? A. Yes, but the question is what prices are we talking about, and I'm not

talking about the price of a program, but I'm talking about the price of an advertising minute on a program—

Q. I see. A. —adjusted for a number of years.

Q. The N.C.A.A. can affect the price of what they get for a football package by restricting their output, but that's not relevant to the economist, is that what you are saying? A. It's basically a transfer between the station, in this instance, and colleges.

Q. Well, sir, the N.C.A.A. can affect the price they get for their total football package? A. Yes.

Q. By restricting the output of other televised football games? [1007] A. Oh, I assume if they were to restrict the output of their programming package, yes, they will get more for the total program.

Q. But to an economist, anyway, that is not the relevant question? A. But you have to make an adjustment for viewers.

Q. All right, sir.

Now, in comparing our football games to grains of wheat, Doctor Landes, you are making the assumption that advertisers view rating points as rating points with the qualification that the demographics may have been different? A. Yes.

Q. And that the advertiser does not care what time of the year or what time of the week the game — he is advertising? A. I certainly said that advertisers can substitute across different time periods, different games, yes.

Q. What you said was it makes no more difference to an advertiser whether his advertising is on a Saturday or Tuesday, than to a car buyer, whether he buys a car on Saturday or Tuesday? A. Because of the ease of substitution across different time periods.

Q. And as an expert on broadcasting, are you saying truly, then, that advertisers do not make an effort to advertise [1008] on particular days of the week or to spread their advertising

over all the days of the week, are you telling the Court that? A. I'm saying that advertisers are interested in reaching viewers.

Q. That was not the question, Doctor Landes. A. But what advertisers are interested in is reaching viewers, and it doesn't matter whether you reached the viewers on Friday night or Saturday night or Saturday afternoon, or Wednesday night.

Q. It matters if he is not watching on Friday night, but he is watching on Saturday afternoon? A. Certainly what you are interested in is reaching viewers, you have made my point.

Q. And if there are viewers—and if there are viewers who will watch football on Saturday afternoon, but don't watch prime time on the week night, then it makes a difference to the advertiser, doesn't it? A. Based on the empirical analysis I did, looking at the advertisers that advertised on N.C.A.A. football, they seem to be widely distributed across all sorts of programming times.

Q. Would you answer the question? If there are advertisers who watch N.C.A.A. on Saturday— A. No viewers?

Q. — viewers who are unlikely to be watching prime [1009] time television, then the advertiser might have a special interest in Saturday afternoon, might he not? A. If you could only reach that set of viewers by advertising on Saturday afternoon, and it was critical to sell your product to reach those set of viewers, then the advertiser might have a special reason to advertise on Saturday afternoon.

Q. If you could only reach them, or would it be enough if you could more likely reach them on Saturday afternoon? A. But your hypothetical, I thought, was that these people did not watch television, except on Saturday afternoon?

Q. They were less likely than others to watch television, except on Saturday afternoon, under those circumstances, wouldn't the broadcaster have a special interest in Saturday afternoon? A. Yes, but subject, again to the qualification that

the advertiser has to market his product, as I understand it, essentially to advertise to this set of customers that are more likely to watch on Saturday afternoon.

Q. And if there is a set of customers who are more likely to buy cars or buy beer or buy computers or buy insurance, and if they are more likely to be watching on Saturday afternoon, then Saturday afternoon becomes special to the advertisers, doesn't it? A. To some advertisers, right.

Q. To some advertisers? [1010] A. To some advertisers, certainly.

Q. And as a matter of fact, if a — if a supplier of programs can significantly expand the total television audience for a certain period of time, then they have market power, don't they? A. Could —

Q. Well — A. that —

Q. In short, a program supplier can exercise market power only if its program significantly expands or improves the demographic characteristcs sought by advertisers of the total television audience? A. Yes.

Q. You agree with that? A. Yes, I probably said it.

Q. Well, we know you did, it's in your report, isn't it? A. Yes.

Q. And would you agree or not agree that it is quite possible, likely, that the number of viewers on Saturday afternoon may be expanded to total number of viewers by the fact that there is an N.C.A.A. football game on? A. It's possible, that the number on Saturday afternoon, although I — I did look at some data on that across three markets, Chicago, Los Angeles and New York.

[1011] Q. On Saturday afternoon? A. On Saturday afternoon. Again, you have a problem here because there's a game on on every Saturday afternoon. And what I did was look at the

double header to ask whether the double header as a second game, so I looked at a time period which the second game was on in New York, a second game that was on in Chicago, and a second game on in Los Angeles and what I found was that although A.B.C.'s share during this hour tended—A.B.C.'s share of the audience, A.B.C.'s share of households watching television tended to increase when there was a second game on, on average on these three markets, there was no increment in total viewers in the three markets, suggesting that basically what a double header was doing or a second game was diverting viewers from one program to another without significantly expanding audiences on Saturday afternoon.

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[1012] Q. Looking at the demographics which you said can also give some market power, would you agree that the demographics of who's watching television in Oklahoma City on Saturday afternoon, are different according to whether there's a football game on or whether they have to choose between "Bullwinkle" reruns and old movies and that type of programming? A. Yes.

* * *

[1013] MR. MUCHMORE: Maybe we ought to be more specific.

Q. What page is that in your report? A. Excuse me, page thirty-eight.

Q. I know — I understand that you say it is part [1014] of the study, let me ask you specifically, do the results on this table three, on page thirty-eight, do those form one of the bases for the opinion, in you mind, that you have expressed in this Court or not? A. One, but I don't consider this a very powerful study.

Q. All right, sir. A. And I indicated so in the report.

Q. But it is one of the things that you have take into account? A. On page thirty-seven, I have an extensive footnote explaining why that is so.

Q. Just very briefly, without going into all the numbers of it, what you are saying—is it not fair to say that what you are saying is that if they have market power, then when the total number of advertising minutes was increased, we would have expected the price to be received by each to decrease? A. That's an implication of a downward sloping demand curve.

Q. Yes. A. And what I said about this table was that I didn't see any evidence of a downward sloping demand curve, and I think I indicated clearly in the footnote that other factors can affect what is happening to price and made an effort to

make some adjustment there by putting it on a deflated basis; [1015] that other factors can affect price and the results here are only indicative or suggestive that there is no negative relationship between price and quantity, as I defined those terms.

Q. All right, sir. Incidentally, the general trend, since, say, 1968 to 1970, has been downward, hasn't it? A. Yes, but they are—if you start in 1960, and you go for the entire period, you see roughly a doubling in advertising minutes and an increase in price of around fifty percent in real terms.

Q. Yes, sir. But the answer to my question, looking at the last ten years, that general trend has been down; the answer to that question is, yes, is it not? A. Yes, if you read that from the table.

Q. Yes, sir.

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[1016] Q. Doctor Landes, let's try very briefly to look at this table three and what it shows, and what your calculations to it are.

What you are saying is nothing more nor less than if the N.C.A.A. had market power, as you have defined it, with college television football, then as over the course of the years if they increased their output, that is the total number of advertising minutes you would expect, since they had market power; that as the output increased, that the price in constant dollars, anyway, would go down? A. Yes, subject to the qualifications that are in the report.

Q. Or to put it another way, all things being equal, you would expect the price to go down? A. Yes, that's what I said in the report.

Q. And all things, of course, as you said in the report, are hardly equal from 1960 to 1981? A. That's what I said in the report.

Q. And as you indicated in the report, inflation could prevent those prices from going down, and did? A. But that's taken into account by column three.

Q. Another thing which could affect whether the price went down or not would be whether the number of television [1017] viewers increased over that period of time, is that not correct? A. Yes, that's true.

Q. Or whether the Gross National Product went up, or the advertising budget of the advertisers increased, all of those things would tend to prevent the price from going down, wouldn't they? A. Yes, or could. I mean, I don't know, but there's—one could have a hypothesis that they would.

Q. And that if the production of college football improved over the twenty years from '60 to'80, with color television, more cameras, instant replay, that is another factor which could enhance the popularity of the sport and could prevent the price from going down? A. Yes.

Q. And if college football or sports generally got more popular over that twenty-year period, so that more people liked to watch it on television, that's another factor that could prevent the price from going down? A. Yes.

Q. So those are the reasons, then, that you have qualified the importance that you put on that study, are they not? A. That's right.

Q. The second study is the one where you state on page thirty-nine, "We are trying to determine now whether [1018] college football television and all other programs, "Laverne and Shirley," "M-A-S-H," are in the same product market? A. Yes.

Q. "And we say if two products are in the same product market, their prices will tend to move together"? A. It's right in the report.

Q. Is the converse of that necessarily true? A. The converse being?

Q. If two product prices tend to move together, then they are in the same product market? A. No, I wouldn't say that.

Q. As a matter of fact, the prices of a lot of things might tend to move together, that wouldn't be in the same product market? A. Yes, sure. That's well-recognized. This is not if you lack a sufficient condition for determining the two products are in the same product market, but it's a test that is suggested to be used as one factor in determining if products are in the same product market, you would expect to find their prices moving together.

Q. What you say here actually is that the results of this test are consistent with their being in the same product market? A. That's right.

Q. In other words, this was a test that could have [1019] proved that they were not, but is not sufficient in itself to prove that they are? A. That's correct.

Q. We are going to need more than this test to determine whether they are in the same product market, aren't we, sir? A. Yes, although the cumulative effect of a number of tests, each one, in and of itself, not sufficient, may be very great.

Q. Well, of course, that power should not have the cumulative effect of that test, is not very great, is it? A. This is a test that is widely used in—among economists when they are discussing the question of whether products are in the same product market, or given products—given product that is sold in two different geographic areas, are in the same given market or not.

Q. All right. Let's look at it. Figure seven is now exhibit now exhibit what? A. ZB-three.

Q. ZB-three? A. Yes.

Q. Let's look at ZB-three. What is your index year there? A. The index year?

Q. Yes, sir. [1020] A. It takes the value one.

Q. What year is that? A. I believe it's '70-71, but the Consumer Price Index is '70-71.

Q. Between '70-71, for example, and '76-77, what happened to the contract price per game of N.C.A.A. football? A. Well, during that period it was not rising as rapidly as the rate of inflation.

Q. We are looking at the deflated one? A. Yes, that's what I said, is not rising as rapidly as the rate of inflation, so that in real terms, it was falling through the period.

Q. In real terms it looks like it declined, twelve, thirteen percent, doesn't it? A. Yes.

Q. Down thirteen percent over that period of time? A. Yes.

Q. Now, what happened to the index of network and T.V. station program and technical expenses during that period of time? A. For one year it went up, and one year it went down, and the next year it went up.

Q. Between '70 and '78, what happened to it? A. Between '70 and '78?

Q. Yes, sir. [1021] A. It went up.

Q. How much? A. I don't know. Roughly twenty-six percent or so, in real terms, thirty percent.

Is that your reading?—from approximately one, to—I don't know, one point three, or one point three five, something like that.

Q. Well, if we look at '76-77, which is what I think I said, it's up maybe—seventeen or eighteen percent, isn't it? A. Well, we—why don't you give me the years again?

Q. All right, '70 to '76-77. A. Yes. I thought you said '78-79.

Q. Well, I'm sorry, because the number I gave you on the other side appears to be from '76-77. In any event, when these two figures which are moving together, you have one of them

up eighteen percent during that period of time, and the other down thirteen percent, don't you? A. Yes, you do, although I don't think it's fair to pick out any particular period if you want to look at the entire pattern of real prices. And you can see that the two series move closely together. In fact, they split the statistical measure of the series indicating a very strong positive correlation between the two.

Q. Sure, they moved positively, just like the prices [1022] of all food in the last twenty years have probably shown a positive correlation. A. I don't know that to be true, once you adjust for the Consumer Price Index.

Q. You wouldn't expect that to be true? A. Some types—certain food has moved more rapidly than the Consumer Price Index. Others have moved less rapidly. So I suspect if you looked at different types of food products, you would find wide variations. And I would expect for those that are roughly comparable in terms of being in the same product market, you would see some pattern like this; and those that weren't, you wouldn't see a pattern like this.

Q. Over that period of time, in any event, they differed by more than thirty percent, didn't they, in real dollars? A. Yes. I mean, I can read that chart.

Q. And it reads more than thirty percent difference? A. For that select period, yes, sir.

Q. And during that period of time when the output of college football television minutes was increasing, the real price per game was decreasing, wasn't it? A. During that period we saw that, for example, when we went to the earlier chart.

Q. Yes, sir. And which is what one would expect to [1023] find if one had market power? A. Yes, but again, I think you want to look at the entire period. And when you look at the entire period in the earlier table, you don't see that pattern.

You pick out any particular, you know, series of years, two years or three years or four years, you may see a relationship, inverse relationship between price and quantity. But if you take a broader view—a broader period and look over the entire period there, you don't see that relationship.

Q. What you mean is if you go back onto the Sixties, you may find a different situation than what I have been talking about in the Seventies, right? A. Yes.

Q. And that's what you would prefer to do? A. I would prefer to use all the information that's available to me, rather than be selective and use information from just the last few years.

Q. Now, sir, the final basis on which you have based your own conclusion that these things are not in the same relative market, has to do with this products advertised question, does it not? A. Yes.

Q. And what you say there is, well—see if you agree that this is a fair statement: there are circumstances like the diabetic who must have a diet soft drink; there are [1024(a)] circumstances where someone has a need for a specialized input, must have it? A. Or essential input, I called it.

Q. All right. Specialized need for a special input. There are such circumstances? A. Yes.

Q. And where you have a circumstance like that, then you may—not "must" but "may"—have a relevant product market? A. Yes, subject to important qualifications that I went through in the paper.

Q. That's why I said "may," not "must." But the converse of that isn't true either, is it?

All right, we will state the converse.

It is true that where you have an advertiser—where you have a buyer with an essential product, that may mean relevant

market, but it certainly doesn't follow that the only time you have a relevant market is where you have an advertiser with a specialized need, does it? A. I am going to write this out so I make sure I understand it exactly.

Q. Are you saying—A. Well—

Q. Are you saying that the only time we have a relevant market is where we have an advertiser with an essential input? [1024(b)] A. No, I don't think I am saying that at all.

Q. Of course not. That would be only a tiny fraction of all the circumstances where you would have a relevant market wouldn't it? A. Yes, it would be.

Q. And all you are saying in this point three is that this isn't one of those special circumstances where there's an essential input? Isn't that all that three says? A. What I am saying—what three shows to me, in a very powerful way, is that there are many substitute programs for advertisers who advertise on N.C.A.A. college football, or wish to advertise. And to the extent that advertisers or the products have substitutes available to market their product, those substitutes should be included in a relevant market.

It's one of the sort of basic applications I discussed in defining a market where you would want to include products that are good substitutes in demand. And here what we observe is that the advertisers selected for the N.C.A.A., that's the basis of selection for this sample, are advertisers where the vast majority of their commercial spots are on non-N.C.A.A. programming.

* * *

[1026] Q. But from the fact that we don't have that particular special circumstance, that, alone, doesn't show that they are not in the same relevant market, does it? A. No, but what we do have here, we have advertisers who can—

Q. Yes, sir. A. —reach a wide variety of viewers on many programs, suggesting that these advertisers that advertise on N.C.A.A. football have available to them numerous substitute programs on which to advertise. That's an important index in terms of defining a relevant market.

* * *

[1027] Q. My question is that we say some kind of relevant markets are in this specialist demand area? A. Yes, you could have a relevant market when you have a lot of specialized consumers, but then you have to ask why is that? That's because they can't substitute away, and that's the point I have been trying to drive at here for the last few minutes, that what we have with this data are advertisers that seem to be able to substitute away from sports programming, as evidenced by the fact that they advertise on a wide variety of programs.

* * *

[1028] Q. All right. People who advertise on N.C.A.A. football do a lot more advertising somewhere else? A. Yes, that's true.

Q. And from that, you infer that they don't need to advertise, or especially want to advertise, on N.C.A.A. football, is that right? A. It would be inconceivable to me that in order to market their product on such a small fraction in the aggregate of their spots, or in N.C.A.A. football, that in order to market their product that N.C.A.A. football is some essential ingredient to marketing and selling their product.

Q. Going from the question whether it's essential, do you also infer from the fact that they spend most of their money elsewhere, buy most of their time elsewhere, that what they spend elsewhere is freely substitutable for what they spend on N.C.A.A. football? A. Basically, they are interested in reaching viewers, and they reach their viewers by advertising on a wide variety of programs. That's—I suggest they can substitute a wide variety of programs to reach their viewers.

Q. Okay. The fact that they spend most of their money not on N.C.A.A. football suggests that other than N.C.A.A. [1029] football is substitutable for N.C.A.A. football? A. That there are sufficient number of viewers available to them on non-N.C.A.A. football, that they can reach those viewers by advertising on those programs, whether they are sports programming or nonsports.

Q. So the fact that they spend very little money on N.C.A.A. football means that they would just as soon spend none and substitute the other programming entirely for N.C.A.A. football? Is that what you are saying? A. I didn't say "none." I presume that an advertiser selects a package of ads to reach viewers, and this particular package that the advertiser selects is probably the optimal package in terms of reaching viewers. But in response to an attempt, say, by the N.C.A.A. indirectly through limiting the number of games to raise the price to advertisers, they are going to substitute away to some of these other programs, because the viewers are basically viewers, they are fungible to advertisers.

Q. But what you are saying is that the advertisers will freely substitute—that is, spend the rest of their money—on other programming? A. They don't have to spend the rest of their money, they have to be able to shift across program types to include them in the same market.

Q. And the fact that they spend very little of their [1030] money on N.C.A.A. football shows, in itself, that they are willing to substitute other programming for what money they do spend on N.C.A.A. football? Is that what you are saying? A. I can repeat again what I am saying. It shows they have numerous other programs on which to advertise and reach viewers, and, therefore, if N.C.A.A. tried to restrict output and indirectly raised the price to advertisers who are advertising on N.C.A.A. football, these advertisers do not appear sufficiently specialized to N.C.A.A. football, for the N.C.A.A. to exercise market power.

These advertisers advertise on a wide variety of programs and varying demographic characteristics, and that is suggesting to me they should all be included in the same market.

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[1034] Q. Now, on this study which is—let's see, what is the exhibit number for your regression analysis study? A. We are now talking about the attendance study?

Q. Pardon me? A. Attendance?

Q. Yes. A. It starts ZB-nine, which identifies the list of colleges.

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Q. Now, what these—let's be real clear on what these tests show and do not.

What these tests show, and only what they show, is that for schools with a specified distance of Oklahoma and Georgia—A. Including Georgia and Oklahoma.

Q. Well, they would be within that distance—there is a probability, high probability, if you wish, that on days when the N.C.A.A. shows a doubleheader, the attendance is less than on days when the N.C.A.A. shows only a single game? A. That's correct.

Q. And that's all it shows? A. Other things the same, yes.

• • •

[1043] Q. Now, this also tends to show, although you have said it's not statistically significant, but it tends to show that having a game televised causes that game to have more people attending it, doesn't it? A. Yes. The precise coefficient here is approximately four percent, that when a particular game is being televised, the attendance at that game is four percent. And I think there's a very simple explanation for that, is that

the games that tend to be televised are the better quality games, the ones that attract more fan interest in general. So that variable is really standing for a measure of the quality of the game.

[1044] If you notice, if you turn to table ZB-thirteen, there is no televised game in that sample, because none of the division two and three schools at that time, for this sample, were ever televised.

Q. What you are saying is the fact that this number is plus, does not mean that televising the game caused the increase in attendance? A. I think it's standing for another variable. It's standing for a quality variable, which we have only imperfect measures, say, of the quality of the game. This is another quality variable measure.

Q. Well, quality—what you are saying is that it does not show that televising the game caused an increase in attendance? A. No. What they show is—

Q. Is that a correct statement? A. What this shows is that televising a game does not cause a reduction in that game's attendance. But televising that game causes a reduction in everybody else's attendance.

Q. Let's stay with what it shows on the game. A. That's what the regression analysis shows.

Q. Yes, sir, but what you are saying is that although when games are televised they tend to have more people at them, that doesn't necessarily demonstrate that it is because [1045] they are televised that they had more people? A. Yes.

Q. Isn't that a fair statement? A. Yes, I said, I believe, that television is a good proxy for the quality of that game.

Q. What you are saying is both the increased attendance and the television tend to be caused by the same outside factor; that is, that it's a good game? A. Or putting it another way, you can view television as a proxy for the quality of the game. It's a common thing done in academic studies by economists to use proxy variables.

Q. What you are saying is that the two go together, but that doesn't necessarily mean that one causes the other, right? A. Because—I have an interpretation of a game that's been televised, when a game is being picked up and televised by the networks, that game is a better quality game, and, therefore, I would expect to find an increase in attendance for that game. And that's precisely what I find.

Q. That because the two go together doesn't necessarily mean that one causes the other; will you accept that? A. Yes.

Q. And that could also be true with your doubleheaders and outside attendance, couldn't it? Just because doubleheaders go together with lesser attendance, does not [1046] necessarily prove that it causes it, does it? A. But that's true in any statistical study. I mean, if you want—

Q. Including this one? A. If you want to restrict statistics, if you want to, you know, just speculate on what the effects are on attendance, that's fine. I tried to go a step beyond that by doing a statistical study. No statistical study definitely shows that "A" causes "B."

Q. If doubleheaders were extended to play in the latter part, and that had something to do with attendance, you would have an outside variable? A. That would be a possibility.

Q. Did you examine whether doubleheaders are played more in November than October? A. I don't recall. I don't think so.

Q. And if they were—did you examine whether the weather, even though it might not be below—your forty-degree weather might not be as advantageous for attendance? Did you look at that? A. Well, we tried to look at weather when we had data on weather.

Q. Only below forty? A dummy variable above forty or below forty? A. Yes.

[1047] Q. Would attendance be the same at forty degrees and seventy-five, or do you have an opinion on that? A. Would you just restate that?

Q. Would you anticipate the attendance at a given game, all things being equal, if the temperature is forty-one and cloudy, or seventy-five and sunny, or would you have an opinion on that? A. I would expect the attendance to be higher when the game is — when it's played when it's sunny weather.

Q. So a possible explanation for your chart would be that the weather is marginally worse in November, although not below forty degrees necessarily, and that more doubleheaders are also played in November? That would be possible? A. It's possible. Again, though, if you go to the division one schools where you do find a smaller effect, you have included variables for, you know, rain, hot and cold.

Q. Well, "cold" meaning below forty degrees? A. Yes. And you can always make a criticism of any empirical studies that some variables are left out. The critical consideration has to be to what extent the variables left out are systematically related to the variables that are included.

* * *

[1051] **WILES HALLOCK**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address, sir. A. My name is Wiles Hallock. My address is 1333 Corte Madera, in Walnut Creek, California.

Q. And what is your occupation? A. I am the executive director of the Pacific Ten Conference.

[1052] Q. And briefly, what does that constitute? A. Pacific Ten Conference is an organization, non-profit, educational organization consisting of ten universities on the west coast, plus the two major universities from Arizona, University of Arizona and Arizona State University.

Q. It includes universities such as Southern Cal, and U.C.L.A., and Washington, and the like? A. Stanford, Cal, Oregon, Oregon State.

Q. Thank you. Now, how long have you held that position, Mr. Hallock? A. I am completing my eleventh year this month.

* * *

[1053] Q. Now, Mr. Hallock, what position in the N.C.A.A. do you now hold? A. I am the chair of the N.C.A.A. Football Television Committee.

Q. Had you been on that T.V. committee some previous time, much earlier? A. I was on the television committee in my present term starting in July of 1979. Previously, when I was commissioner of the Western Athletic Conference, I served for about a year-and-a-half, during the period back in '69 and '70.

Q. And when did you become chairman of the N.C.A.A. T.V. committee? A. I became chairman of the N.C.A.A. Television Committee in September, 1980.

* * *

[1061] Q. Now, when it came time that the nightly T.V. contract with A.B.C. for the period 1978 through 1981 was running its course, what then became the responsibility of the committee? A. Responsibility of the committee then becomes one of formulating a new television plan or principles for a new television plan, which will take effect with the expiration of the current contract.

Q. And did you, in fact, begin that activity in the early part of 1981? A. Yes, we did, January.

Q. What, in general, did you do? A. The first act which was taken was to send a questionnaire, a broad questionnaire relative to the membership's feelings about the present plan, whether it was satisfactory, what changes ought to be made in any new plan, any new set of principles which were to be formulated by the committee and submitted to the membership.

Q. Now, that was sent to all the members? A. Yes.

Q. Now, what happens to the responses when they come back? A. Responses are elevated, tabulated.

Q. Who does that? A. The staff of the N.C.A.A. does that. The television [1062] committee, itself, has the opportunity to look at the questionnaires, to divide them up at a face-to-face meeting, and to seek to draw conclusions from them.

Q. And do they read them by their districts, these geographical things we mentioned? A. Yes, pretty much.

Q. Now, after that process, what happens next? A. Because of the great interest in the upcoming television plan, the principles which were to be voted on by the membership, the committee decided not only to go by the results of the questionnaire, but to hold hearings and give any member or any conference who wished to come before the committee to make recommendations relative to the formulation of the principles, to do so.

Q. Were such hearings held in Kansas City? A. Yes, they were.

Q. Approximately when? A. Approximately February five and six.

Q. Of 1981? A. Of 1981.

Q. And what happened? A. We had a broad participation in those hearings. Virtually every one A and one double A

conference was represented in some way. The College Football Association was represented as an entity. There were individuals who [1063] came and wished to speak to the committee, as well, but mainly conferences.

Q. Do you remember who appeared for C.F.A.? A. The C.F.A. delegation consisted of four or five, or maybe six members, chaired by Mr. Scott, of Alabama, including Charles Ninas, an executive director of football, Ed Czekaj, from Penn State University.

Q. You don't have to give them all, thank you.

Did each of these members come in and give his views on the forthcoming, upcoming television plan and contract that was being developed? A. Yes, they did. Each conference representative and each representative within the C.F.A. delegation did.

Q. Now, what did the committee—excuse me, Mr. Hallock, I need to ask another question.

During these meetings with the representatives and members in Kansas City early in February, did any of the people who came before your committee state that they wanted no controls whatever on football television? A. No.

* * *

[1064] Q. What did they express generally in terms of their attitude toward television football controls by N.C.A.A.?

* * *

A. There were no statements to the committee relative to—relative to putting aside the control of television by N.C.A.A. All of the suggestions made were relative to principles of the forthcoming plan.

Q. In terms of the types and kinds of controls there should be? A. Yes.

Q. And did that deal with matters like the number of appearances? A. It did.

Q. Any others that you remember? A. I think the television committee was—was impressed with the fact that general satisfaction was expressed with the present plan. There was less—less request for relaxation of the appearance rules than we might have expected, which was also true in the survey.

There was considerable interest expressed in going to the two-network approach. There was interest expressed insofar as possible relaxation of the exception telecast rules to [1065] permit greater flexibility on the part of the institutions; that would be the only thing that dealt with control, whatsoever.

And there was considerable opinion expressed for greater regionalization, more regional games, more realistic regionalization of the games.

On the part of the one double A people, there was definitely expressed the desire to continue the restrictions on exception telecasts. The one double A conferences were quite concerned about the effect that television might have on their attendance.

Q. Mr. Hallock, after these hearings in Kansas City early in February, what did the committee do next? A. The committee then held a two-day session, inviting the networks, both over-the-air networks and the cable and subscription entities to come before the entity and bring us up-to-date on what they felt should be included in the principles of a new plan. And this session, we felt, was very productive.

Q. Now, who generally, without going into each one, came before you in that case? A. The three major networks, A.B.C. and C.B.S. and N.B.C. all appeared. E.S.P.N., probably the best-known cable network at that time. U.S.A. Cable Network; On T.V.; there were—which is a subscription television network. And at [1066] least one other subscription T.V. entity.

Q. And were these media making presentations of what they would like to see the N.C.A.A. do in the upcoming television program? A. Yes, they were. Both specifically and in a general way attempting to predict what was happening in the state of the art in television, and what the committee should be alerted to.

Q. Those were more of an exchange of views; they weren't negotiations? A. No, they were not negotiations. The major networks, of course, all expressed interest in—in the series.

A.B.C., understandably, was not as delighted about a two-network approach as were C.B.S. and N.B.C.

Q. Why was that? A. I think A.B.C. felt that the exclusivity of the one-network situation, which they had—they had telecast since 1966, was one that they wanted to preserve, and any loss of that exclusivity, they felt, was not in their best interests.

Q. What did the other networks do? A. They felt the other way, they both wanted a piece of the action, so to speak.

* * *

[1067] Did the committee, in considering the T.V. plan, or [1068] "principles," as you called them, for this year, have before it knowledge about a T.V. plan that had been developed by the C.F.A.? A. Yes, the committee did.

Q. Tell the Court about that, please. A. The committee had the C.F.A. television plan, and at its meeting in Philadelphia, went over in great detail, paragraph-by-paragraph, the C.F.A. plan for input relative to what it might — what the committee might do in the development of the N.C.A.A. principles.

Q. Now, what happened next? A. The principles were, as I said, finalized, and at that point, the next step was to send the principles to the membership-at-large for a vote.

Q. That was done on a mail referendum? A. Mail referendum, yes.

Q. What was the result of that? A. The result of that was overwhelming support of the principles for a new plan. I think the vote was two hundred and twenty in favor, and six against, and something like twenty-four abstentions.

Q. And had the principles been approved by the N.C.A.A. council before they were sent out for the mail referendum? A. Yes. I should have mentioned that they have to be approved by the council.

[1069] Q. Now, would you tell the Court, in effect, what the function of these principles are in connection with your work, once they are adopted? A. Once the principles are adopted, the committee is held responsible for negotiating a contract in conformance with the principles stated. It may not vary a great deal from the principles. In fact, any variance from the principles that it gets involved with in negotiating a contract, has to go back either to the council or to the membership for approval

* * *

[1093] Q. And do you believe that, that if the controls were lost, that the amount you could get for rights fees, such as A.B.C. and C.B.S. would go down? A. Yes, I do believe that, because they would be competing college football on other channels which would dilute the exclusivity of the network telecast as they occur on the N.C.A.A. programming.

Q. And they are willing to pay extra for that exclusivity? A. Yes, they are.

Q. And just as they are willing to pay still more, exclusivity extends four years instead of two? A. That's correct.

Q. And that is, in fact, the principal reason that A.B.C. wanted that longer exclusivity, that you negotiated a four-year

contract after the committee had earlier taken the position that two years would be more appropriate? A. Yes, I think all they wanted was to hold on to their properties packages that they feel valuable to them for as long as possible in light of what is happening in the world of cable.

Q. And they are willing to pay extras in order to [1094] hang on a little longer? A. I think that's correct.

Q. Do you agree with what you said a little earlier, I think you said Mr. Byers said if the N.C.A.A. contract with A.B.C. and C.B.S. is not the conditions under which we all operate, that there is tantamount to elimination of controls? A. Yes, if anyone within the N.C.A.A. is permitted to make his own football television deal, willy-nilly, then the N.C.A.A. has lost control.

Q. What if the N.C.A.A. makes rules, controls if you will, that tell the school how often and when it can be on television, but tells that school that they can contract with any network they want for any price they want, wouldn't we still have controls there? A. You would have — I suppose you would have a measure of control.

Q. Wouldn't that be a practical way to both, authorize the amount of football television there was and give the schools their freedom of choice of who to contract with? A. I don't know whether it would be or not.

* * *

[1100] Q. Now, how did it come to pass that the dollar amount of the A.B.C. and C.B.S. contracts were identical? A. I'm trying to search my memory for the — originally, the A.B.C. bid contained in it what A.B.C. chose to call as a favored nations clause, and in that clause, it was agreed to, and the N.C.A.A. agreed that if the price that was offered by the second network was less than A.B.C. offered — this is general terminology — less than A.B.C. offered, that — that A.B.C. would have the — would have some option to reduce its price. But if it were more than A.B.C. offered, then A.B.C. would have to match it.

[1101] Q. Did — A. One of those or the other occurred. And C.B.S. offered, as it turned out, slightly more than the A.B.C. offer, and A.B.C. then was required to meet it.

* * *

[3] **(EXHIBIT 131-D)**

DEPOSITION OF WILES HALLOCK, DEPOSED NOVEMBER 11, 1981.

WILES HALLOCK,

a Witness, of lawful age, being produced, sworn and examined on behalf of the Plaintiffs, deposeth and saith:

Direct Examination by Mr. Muchmore:

* * *

[50] Q. During the negotiations with ABC, CBS and NBC between the middle of June and the 29th of July, what discussions were there as to the amounts to be paid for individual national and regional football games in any of the four zones being negotiated? A. Between what dates?

Q. During the negotiations from mid-June to late-July, '81. I understand there were overall totals of money that were discussed? A. Correct.

Q. But I want to direct you to what discussions there were about amounts to be paid for individual national and regional games. A. There was no discussion on that subject except the realization on the part of the Committee that it was possible with a two-network approach, two-network contract, that the networks might be paying different amounts for respective games. That is the only discussion we had.

Q. Well, would you amplify that? Who was that discussion with? [51] A. Well, that was just within the Committee. We understood that, and have always understood that the network has the right to set the prices and that we recognize that we are in a different ballgame with two networks than we were with one from the standpoint of the possibility of differing rights fees and even differing rights fees for a particular game or as an incentive perhaps to move particular games.

Q. So, you are saying, then, that the Committee had internal discussion that somebody might make more money appearing on one network than another network? A. Yes. If the rights fees were different, that could very well happen, and we had previously discussed the viability of an incentive because of ABC's talking to us in terms of how difficult it was to get teams to move into special dates and so on.

Q. And the question was ABC wanted you to approve being able to offer more money to a team who would move a game? A. It really was not resolved. It was just discussed as a possibility. As I remember, ABC was not sure that that would make that much difference as an incentive. There were teams that would not move for any kind of incentive, and it might make a difference with some, but I don't think there was any conviction that this would solve the problem.

Q. But did ABC indicate they might want to make that request of you? [52] A. They don't have to request that. I mean, if they decide they want to do that, they can do that.

Q. There was no discussion at all with ABC or CBS, then, as to what the amount to be paid for individual games would be? A. No.

Q. Has there been any discussion of that since? A. No.

Q. Do you know now what an individual game will be worth on either ABC or CBS next year? A. No.

* * *

[70] Q. Have you given any consideration since you have been on the Football Television Committee to accomplishing or otherwise seeing to it that there are done any studies which would directly ascertain what the effect of football television is on live attendance? A. Since I have been on the Committee, there have been no studies entered into by the NCAA on that subject. You hear, you know, individual reports from people from time to time relative to what effect it has. In my own experience in the Pac Ten, I do know that television of a game in Los Angeles certainly affects very substantially the attendance at the Los Angeles Colosseum.

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[1130] **CHARLES SCOTT**

was called as a witness by the defendan, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Mr. Scott, would you please state your name and address? A. My name is Charles Scott, my address is 73 High Forest, Tuscaloosa, Alabama.

Q. What is your occupation? A. My occupation is educational administration.

Q. What is your primary field in education? [1131] A. My title is associatc academic vice-president.

* * *

Q. What is your representation of the University of Alabama in the N.C.A.A.? A. My athletic association at the University of Alabama is as chairman of its committee on intercollegiates. In that [1132] capacity, I represent the institution at N.C.A.A. meetings and at Southeastern Conference meetings, according to assignments from the president.

Q. What positions have you held in the N.C.A.A.? A. I have held a position of vice-president for region three, which placed me on the N.C.A.A. Council. I currently serve as a member of the N.C.A.A. executive committee and I have served on some various other committees as member, as a member of the committee.

* * *

[1133] Q. Now, is Alabama a member of the College Football Association? A. Yes.

Q. And has it been from the beginning, about 1977? A. Yes.

Q. In fact, your president, Doctor Thomas, is one of the new directors? A. That's correct.

* * *

[1134] Q. Where do you believe that controls of the type exercised by the N.C.A.A. since 1973, on college football television, fit into the intercollegiate picture? A. In my judgment, I believe that some kind of controls are necessary in this area. The controls should be at some central level, be it the N.C.A.A. or some other agency that may have some opportunity for control over the institutions [1135] that are participating in such a program.

Q. What do you think would be the consequences of eliminating all controls and leaving football television just free and open? A. I think that the University of Alabama and its current operation of its athletic program would probably still receive considerable amount of attention from television. I think there are other institutions in the country that will continue to—would continue to receive attention, as well, but I think that some effects may be developed that might be detrimental to the current operation. I'm not aware, for example, of any data which I could report which would indicate that the pricing, for example, might be retained where it is. I

can envision a situation, for example, in the State of Alabama where we have two major institutions that networks could be vying against the two institutions, and it's like anything else, when we got lots of it, the price of it in all probability will go down to meet whatever the conditions are.

Q. The other major institution in Alabama is what? A. Auburn University.

Q. They have a major football program? A. They do.

Q. Now, Mr. Scott, in your membership of Alabama in the College Football Association, have you been an active [1136] member there? A. Yes.

Q. And could you describe for the Court the areas in which you have acted? A. At times during the history of the College Football Association, I have been the voting delegate to the College Football Association's annual meeting. I think I have been to all of the meetings, perhaps missing one or two. From the standpoint of the University of Alabama, I think that has been my association.

Q. And from the beginning, what did you understand that Alabama's interest was in being a member of the C.F.A.? A. The University of Alabama provides an athletic program which we think has some stature, and we saw in the College Football Association, the beginnings of a group of individual institutions coming, too, these institutions having a like interest and common interest and wanting to do something about their activities within the N.C.A.A.

Q. What parts of the N.C.A.A. operation did you wish to work toward changing? A. There were some questions about the governance of the organization, I believe if I recall correctly, that the initial impetus for these individuals coming together came about from some changes that took place in the academic standards for administration of student athletes to the [1137] university, and this change came about as a vote of the total membership, and there were representatives among these ma-

jor institutions who felt that these standards should not have been changed as they were.

Q. Did Alabama have a concern about the size of division one A for football purposes? A. Yes, we have had a continuing concern that there were institutions in that grouping that did not provide programs which we thought were the same stature as those we provided.

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[1138] Q. Now, Mr. Scott, did you observe a time when the C.F.A. became interested in football television? A. Yes.

Q. How did that happen and when was it? A. It grew over a period of time, as I recall, I [1139] think it was in the convention—the annual meeting of 1979, when there was some discussion at the annual meeting about some of the financing in the N.C.A.A., and what the effects were; where these funds were going, and some questions of this type, and there was created at that time a study committee, as I recall, each of the conferences was asked to appoint one member to it, and I was asked to be a member of that committee from the standpoint of member of the Southeastern Conference.

• • •

Q. Now, did there come a time when you became chairman of that committee? A. Yes, there did.

[1140] Q. And was that the time when the television plan was developed? A. It was during the time I was serving as chairman that we developed an outline of the program.

Q. Now, could you tell the Court, in general, the similarities, I don't know the details, but the basic pattern of that plan compared to the C.F.A. plan? A. They were quite similar. We determined quite early that the expedient thing to do in determining that plan was to take the N.C.A.A. plan as it is presented annually in the publication and to identify those areas in the plan where there seemed to be concerns on the part of the C.F.A. members and to make adjustments in those statements.

• • •

Q. Mr. Scott, did you make an effort with your T.V. committee and C.F.A. to find out the feelings of the members [1141] on these matters of football television? A. Yes, we did.

Q. How did you go about it? A. We developed a questionnaire early, mid 1980, I believe, and submitted it to the membership to determine their thoughts on certain areas.

Q. Now, did your committee meet from time to time with the N.C.A.A. football T.V. committee to exchange ideas? A. We had met them once before we did that questionnaire and once after.

Q. Was Chairman Wiles Hallock there when you had those two meetings.? A. yes.

Q. Did you then in your development of a possible T.V. plan for the C.F.A., follow the expressed opinions or the judgment of the members? A. We incorporated that information into the adjustments that we made.

Q. And then you reduced the plan to writing, did you? A. Yes.

Q. And I believe that's in evidence, so we won't get into it.

I think the first meeting, I would like to confirm this, between you and the N.C.A.A. T.V. committee was in Monterey, in the summer of 1980, is that correct? [1142] A. It was in Monterey, and it was mid 1980.

Q. Was that more of an exchange of your own television experience? A. Yes. At that time we did not have the information from the institution and we were more or less exchanging personal information of our own.

Q. And was the second meeting in February of 1981? A. The second meeting was a called meeting, yes, it was early 1981.

Q. What happened there? A. We expressed a number of concerns to the committee, these concerns had come from this service.

Q. Now was action taken by the N.C.A.A. regarding those concerns? A. In my judgment, the N.C.A.A. television committee, together with the actions that took place at the special meeting in December, 1981, and the actions taken at the January, 1982, meeting, did meet the issues which we obtained from that survey. There were two issues that were somewhat contradictory in nature and could not be met. There was an indication from the membership that it desired the number of appearances to remain essentially as they were, but there was an indication that there was a desire that the—that some experimentation with two networks be developed.

Well, it seems to me if we expand two networks, we would [1143] need to expand the number of appearances, so other than those two, all of the items in that—all of the issues that came out of the survey, I think, that related to the incident were met in those two or three areas.

Q. And you are referring to the conventions in December of '81, and January of '82? A. That's correct.

* * *

[1144] Q. Did there come expressions in the C.F.A. that this television plan, contract activity, should be used for leverage to gain other objectives? A. In my judgment, we started out with that as an objective, that the television contracts of the N.C.A.A. at that time would terminate on a certain date, and that this [1145] development in the—of the C.F.A. into a television program might be a lever to work at these other issues, whatever they might be, in restructuring the N.C.A.A. and academic standards or whatever. I'm not sure, though, that those issues were truly clearly defined.

Q. Who made the decision for Alabama as to whether it would adhere to the N.B.C. contract? A. The president of the university.

Q. And do you know how he decided or—yes, decided? A. I would answer, no, to both.

Q. To your knowledge, was anyone at Alabama coerced by the N.C.A.A. in connection with the decision as to whether it would adhere to the N.B.C. contract or not? A. I did not, myself, interpret any coercion there, nor did I advise the presidents or the athletic director that coercion existed.

Q. Have any of the groups you have been with or you considered the possibility of setting up a separate association to deal with intercollegiate athletics, apart from the N.C.A.A.? A. I have not worked with any group which developed such a plan. I have stated myself on several occasions that it is not within me to violate rules, that if we get to the point that issues are such that we cannot accept them, then we should consider severance from an organization before picking and choosing those rules which we will adhere to or violate.

[1146] Q. You believe it's feasible for a group of N.C.A.A. to set up a separate organization to perform its function? A. Yes, it would have to duplicate the N.C.A.A., but it can be done.

Q. Mr. Scott, there was testimony earlier in the trial concerning a recent meeting of the C.F.A. members in Dallas, Texas, within a week or so, and it involved a panel discussion at which Mr. O'Malley, Jan Sundberg, and Mr. Wussler appeared. Were you present? A. Yes.

Q. And was that last Friday or Saturday? A. That would have been a week ago today—Friday, afternoon.

Q. And now, what was the purpose of that panel? A. The panel was listed, I believe, in the program as a discussion of television issues or some related topic of that type.

Q. And did there come up a discussion concerning the upcoming season and the football television under the N.C.A.A. plan? A. Both Jan and Kevin reported activities to the present, about the participation of the—both networks in the program the coming year.

Q. And did you pose a question to the panel after they had made the presentations? [1147] A. Yes.

Q. And what was your question? A. The presentation from Jan—

Q. Jan is Jan Sundberg, an attorney from A.B.C.? A. Right, yes. The presentation from Jan Sundberg seemed to say to me that A.B.C. would be paying fixed prices for games this year, a certain price for a national game, and another price for a regional game. Mr. O'Malley, from C.B.S., did not present any fixed toll values, but indicated that they would be announced and I got the impression that they would be inflexible, also. This seemed to be a change in philosophy related to the television contract to me, a change in philosophy from previous years' contracts, to me, so I expressed that thought as an opening statement to them and then I posed a hypothetical football game which would—could not take place in the coming year. I posed the game between the University of Alabama and the University of Georgia in which I indicated that Herschel Walker would have scored some thirty odd touchdowns by the time of that game; that both teams would come to that game with perfect records, nine wins and no defeats, and you have got Mr. Dooley, an outstanding coach on one side, and you have Paul Bryant, an outstanding coach on the other side. I posed the situation in which the University of Alabama would have had four touchdowns in those nine games scored against it, and that both teams have [1148] outstanding other players on the squad.

I simply said, "Now, what would you pay for that game, for Monday afternoon?" You are on the telephone, that's a game you want, and whichever school has that game as a home game says, "I want more. What are you prepared to pay?"

I think that's the gist of what I asked.

Q. And to whom was that question addressed? A. It was addressed to both Jan Sundberg and Kevin O'Malley.

Q. Who responded? A. I believe Jan Sundberg responded first and indicated, as I recall, that my assumption initially was correct, that the fee was not negotiable. Kevin O'Malley, I

would say, hedged a bit in that I believe his statement was that he could never say, "Never," but he didn't think that they would be in a position to get into any competitive bidding.

Now, I'm paraphrasing both of them, but that's the gist of what I recall I heard.

[001158] **CHARLES ALAN WRIGHT**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address. A. Charles Alan Wright, 5304 Western Hills Drive, Austin, Texas.

Q. And what is your occupation? A. I am a professor of law for the University of Texas.

Q. And specifically what field are you in, or fields? A. Two; constitutional law and federal courts.

Q. And how long have you been a professor of law at the University of Texas? A. Twenty-seven years.

Q. Twenty-seven? A. Yes, sir.

Q. Have you had other teaching responsibilities? A. I taught five years at the University of Minnesota before I went to Texas. While I have been at Texas, I have [001159] been a visiting professor at the University of Pennsylvania, at Harvard, and Yale.

Q. Could you summarize briefly for the Court your education and professional career? A. I am a graduate of Wesleyan University in Connecticut, and the Yale University Law School. I clerked for one year for the judge at the Second Circuit, and went immediately after that into law teaching.

Q. When did you graduate from Yale Law School? A. Nineteen forty-nine.

Q. And have you written in these fields of law in which you are a professor? A. Yes, sir. I have written a number of books, plus articles.

Q. Are you one of the authors of *Wright and Miller On Federal Practice?* A. I am.

Q. Now, Professor Wright, state for the record, please, whether the University of Texas is a member of the N.C.A.A.? A. It is.

Q. And because of that, have you, or for other reasons as well, served on N.C.A.A. committees? A. The only one has been the committee on infractions. I have been a member of that since 1973.

Q. And what is your present position on that committee? [001160] A. I am chairman of the committee.

Q. Who are the other members?

* * *

The last two I have named are athletic directors; the first four are law professors.

Q. Now, that's a committee of six? A. Yes, sir.

Q. And are any of those—are any members of the infractions committee from the staff of the N.C.A.A.? A. No, sir.

Q. They are all from the institutions— A. Yes, sir.

Q. —either as professor or athletic directors? [001161] A. That's correct.

* * *

Q. Is there a connection between your work on the enforcement committee and the educational objectives of the N.C.A.A.? A. In my judgment, there is.

Q. What is that? A. Intercollegiate athletics. It seems to me that is a legitimate part of educational institutions such as my own.

I have read suggestions that—from most recently, from the American Council of Education, that we ought to have professional teams in the colleges. I think that it would be a terrible mistake.

I think that there is a valid educational role for athletics, but if it is to have that educational role, that all of your institutions have to be operating under the same rules. And it is the function of the infractions committee to the extent that we are able, to see that member institutions do comply with rules that the membership has adopted.

[001162] Q. Is that what you call "competitive balance"? A. Oh, yes. Absolutely.

Q. Would you explain to the Court what that means in your understanding? A. Well, that athletics would be a less valuable part of the educational experience if there were not fair competition among the teams that are going out on the field to compete, and this means not only that you have rules about how many people you can have on your squad, that sort of thing, it also means that our institution should have an equal opportunity to attract young men or women to compete for them.

And a good deal of the N.C.A.A. legislation is intended to preserve this competitive balance among our member institutions.

Q. Now, what generally is the function of the—of your enforcement committee? A. Our function—we are essentially a judicial body within the N.C.A.A. structure. Our staff will bring charges against an institution if it believes that there has been a rule violation. The institution will respond in writing. There is then a hearing, at which the six of us hear the evidence on both sides, make findings of fact, and determine what penalty, if any, should be assessed.

Q. And in the course of those proceedings, does the institution involved have a right to counsel? [001163] A. Oh, yes.

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[001164] Q. Does your committee have any authority to expel a member from the N.C.A.A.? A. No. That could be done only by the annual convention.

Q. And that is spelled out in the constitutional procedures? A. Yes, sir.

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[001167] Q. Do you have a view on the importance of these enforcement procedures to the general N.C.A.A. achievement of its objectives? A. I think my own view is that it is extremely important, and I believe the member institutions have indicated several times that they think it is very important, by increasing the budget and enlarging the enforcement staff. The members want the rules to be enforced, and our committee does the best we can to enforce them.

Q. What do you believe would happen if there were no enforcement procedures to the basic N.C.A.A. rules? A. I think that athletics would be a jungle. It is sometimes a rather difficult place, even with the best enforcement efforts. If we had no enforcement, there would simply be widespread disregard of controlling legislation.

Q. There is in evidence in this case, Professor Wright, an official interpretation regarding football television. It's exhibit number two, and it was made in April of 1981, by the council. Are you familiar with that? A. I believe I know to what you are referring, yes, sir.

Q. And what is the attitude, or what is the relationship of such an interpretation to the rules and regulations which your committee deals with? [001168] A. The constitution provides

that interpretations of the council are binding on the membership. They can be reversed by the membership at the following convention. For that reason, they are binding also on the infractions committee.

The committee does not feel that we have any legislative function, our business is to enforce whatever rules the N.C.A.A. has adopted. And since interpretations, unless reversed, have the same force as the constitution or bylaws, we have to enforce interpretations, as well.

* * *

[001169] Q. Did you have an occasion to discuss the matter with Charles Neinas, the executive secretary of the C.F.A.? A. I did.

Q. Would you tell the Court about when that occurred? A. It occurred some time in August of 1981. He called me with some questions about what, under N.C.A.A. procedures, might happen if his institution entered into contracts with N.B.C. He asked me whether institutions would have a right to a hearing before the infractions committee, or the committee simply act on its own and penalize them.

And I assured him that it would have to be an official inquiry, right to counsel, all of that.

He asked me if it were found that his institution had violated the conditions and obligations of membership, did I think that would mean that the institution would be given sanction in the sport of football.

I told him that as a matter of past history in the conditions and obligations of membership cases that I was familiar with, the penalty always applied to all sports, and not merely to a single sport.

He also—another thing he asked me was would his [001170] institutions be in violation, and would procedures

start on the day they entered into a contract, or on the day that they actually appeared in a televised football game, televised by N.B.C.

I told him I thought that was a very interesting question, to which I did not know the answer.

I subsequently learned that there was an interpretation by the council, and I was not aware of that at the time I talked to Mr. Neinas.

* * *

[001172] *Cross Examination by Mr. Coats:*

Q. All right. Let me hand you—it's been marked, an application, Plaintiffs' Exhibit One Twenty-three, and ask you—I will tell you that it is a xerox copy of an article that appeared here in the *Daily Oklahoman*, by Jerry McConnell. And it has some quotes in there by you, about possible penalties. And I wonder if you recognize that as [001173] being a true and fair statement of what you told Mr. McConnell?

MR. HARRY: Your Honor, I am checking to see if that is in evidence.

MR. COATS: It is not yet in evidence.

THE COURT: I think he's identifying it at this time, Mr. Harry.

MR. HARRY: Very well.

MR. COATS: It hasn't been offered.

MR. HARRY: Have we been furnished a copy?

MR. MUCHMORE: At the preliminary injunction.

MR. COATS: It was in the preliminary injunction. It was in evidence at the preliminary injunction hearing.

MR. MUCHMORE: It's exhibit one twenty-three.

MR. COATS: That was preliminary injunction hearing exhibit number ten.

THE WITNESS: It appears to be an accurate report of a telephone conversation with me.

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[001176] Q. All right, sir. During the time of this—that this controversy involving the schools that had indicated an interest in N.B.C., did you have discussion with Mr. Byers about the possible infractions and the possible penalties thereof? A. I did not.

Q. All right, sir. Did you have any conference with [001177] Mr. Frank or other members of the council? A. I did not.

Q. So the statements that are in the newspaper article are your statements based on your past experience, and the circumstances arising from your experience on the infractions committee? A. That's correct.

[001223] **PAUL KLEIN**

was called as a witness by the defendant, and having been first duly sworn, testified upon his oath as follows, to-wit:

Direct Examination by Mr. Harry:

Q. Please state your name and address, sir? A. My name is Paul Klein, 5505 Independence Avenue, Bronx, New York.

Q. What is your business, Mr. Klein? A. I'm the president of P.K.O. Television, Limited, a production company.

Q. Would you describe what a production company is and does? A. Well, this production company is a small production company that supplies programs, basically, to television. For instance, right now — we have been in business about three years. Right now, we have a — the American version of an international production with Sophia Loren in Italy. We are producing a soap opera for pay television called "Romans." Prior to that, last year, we did an acclaimed mini series of "People versus Jean Harris," Ellen Burstein.

We did a movie right near here, San Antone, called "Three Hundred Miles," for Steve Knee, with Tony Orlando, a big cast.

We did a movie specifically to play opposite football, called "The Day The Woman Got Even," and we do things like that.

[001224] Q. Now, would you give the Court a summary of your educational and business career prior to the time that you became an independent producer? A. Okay. I — when I graduated from high school, I went into the army air corps, and after that, I went to Brooklyn College and graduated from Brooklyn College in 1953. I then got a job in an advertising agency. I graduated with a degree in mathematics of philosophy. I got a job at an advertising agency where I learned the

rating business and then another advertising agency where I became the head of research, called Arledge and Sherman.

Q. When were there doing that? A. In 1955 to '60, approximately.

Q. Yes. A. And then, January, 1961, I joined N.B.C. I was the supervisor of ratings, and then I worked my way up to manager of ratings, manager of audience measurement and eventually vice-president of audience measurement, which was a very big job at the time; the marketing head, so to speak, of N.B.C., television and radio.

Then I left N.B.C. in 1970, August, 1970, to form my own company called Computer Television, Incorporated, which was trying to begin pay television, pay per view television, and we had an investor, Time, Incorporated, and after about five or six years, they bought me out, and as they bought [001225] out the sister company, which was Home Box Office, and — I went back to work at N.B.C., in 1976, in a marketing job, and then I was made executive vice-president of programs, and I stayed there until March, '79, and then formed P.K.O. Television.

Q. Now, where were you physically located during all of this business career? A. New York City.

Q. You were in New York.

Is that the center of activity in television at this time, for the United States? A. Television advertising, yes, sir, there is a production —there's a lot of production in Hollywood and Burbank. The television sales—television marketing generally comes out of New York.

Q. Now, have you done work and do you do work as a consultant? A. Yes, I have been a consultant to many places, A.B.C.-owned stations; T.V. Guide, all sorts of places; Forum Communications; The Arthritis Foundation. I do a lot of that.

Q. And in what capacity do you consult with those people? A. Basically, the business—the economics of tele-

vision or what kinds of programs to market or what kinds of programs to buy, how much to spend, who to market it to, that [001226] kind of thing, media plans.

Q. Have you been a teacher? A. Yes, I taught the economics of broadcasting at Hunter College, and I have lectured at Harvard and M.I.T. and all over.

Q. And have you testified in court before? A. Yes, I have testified many times in trials, testified for N.B.C. when I was with N.B.C., on antitrust matters, and things like that, and I have testified for Cox Broadcasting, and other people.

* * *

[001227] Q. Mr. Klein, let me ask you to explain to the Court, please, as of now, in the television industry, how essentially in the main elements it operates? A. Well, commercial television, which is different [001228] than pay television and I will talk about that later, commercial television operates this way: The supply—the producer, the distributor, the network or the station, sells audiences to advertisers, for a sum of money which is called the cost per thousand. They assemble these audiences by putting on programs, the programs are immaterial, the only thing that matters after the program is on the air, is the size of the audience, and then that size of the audience is sold to an advertiser. And presumably, the business is a very simple thing; you have to sell your time for more money than you pay for your program, and your administration and your costs and commissions, et cetera, and that's the nature of the business, if you don't do that, then you will have a loss.

* * *

[001230] Q. Now, where do the commercial messages come into this process? A. The commercial messages are placed in and around the advertising, the programming. A network, let's say—let's take a network, for a moment, advertises a program and it has a certain amount, fifteen minutes of an hour of

programming, a little less now than forty-nine, forty-eight, and the rest of the time is devoted to promotion and advertising.

The networks then have a sales force that sells advertising. Now, they sell advertising in two ways: One, if it's a new program, they sell advertising on the cuff; that is, it's—everybody has an idea of what it is going to be and every advertising agency who was the agent for the advertiser, decides what the audience is going to be, but it's from a fixed market. Commercial television up until now has been a limited spectrum business, a very predictable business in that every Tuesday, at nine o'clock at night, there is an audience available, nationwide, and it is predictable. It varies very minor from year to year. The only time it varies is by season.

And so that the networks then divide that time period, that audience up with about sixty sets in use, meaning sixty percent of the homes irrespective of the program content, will be watching television at a given moment in time.

And that the networks then predict what they are going [001231] to get, thirty percent of that, forty percent of that, twenty percent of that, and they have to convince the advertiser that they are going to get a big share of that audience.

Some advertisers are bullish on a program, some are not. But the second kind of programming is one that is renewed, a program that has already delivered a share of audience and has a competitive track record that's a little easier to sell and you can sell that to anybody.

And that's the process that goes on and the advertiser then pays for the audience in terms of a cost per thousand. Some audiences are worth a little more than other audiences; young women are worth more than older women, they buy more, they have kids, they have more needs; young men are worth more than old men, and that's the process.

Q. Is that called demographics? A. Demographics is the term used for — in the United States, this happens to be the only place in the world that it is done, the television audience is measured in homes viewing; that is, sets using television, using a program. You have to get beyond that measure and determine who is in front of the set because a twenty rating of "Happy Days" is not the same as a twenty rating of the "Godfather," I always use that illustration. If those two programs played opposite and got a twenty, the twenty rating with "Happy Days" was full of kids and people who didn't — weren't able to drive [001232] yet, and "Godfather" was full of people who would go diverse and spend a lot of money, and so it was a different value; "Godfather" was worth approximately twice as much for the same rating points.

* * *

[001235] Q. How important is deliverability and what is that? A. Deliverability, the network buys programs from producers, from companies that produce either — actually produce it or have it from other medium. For instance, there are packages of feature items, pictures that have already been made for another market, theatrical exhibition, and Twentieth Century Fox may have twenty pictures in a package. They would then sell those pictures, so they don't need any deliverability, it's there, you can see it, you know the track record of pictures, you know who is in it, and they sell that to a network or local station.

Then there is deliverability in terms of movies made for television. You go to a producer and say, "I like this idea, make the picture," so you know that you are going to get that picture on a certain date.

Then there's deliverability for a series like a situation comedy, you go to Norman Lear, because he's done it and he's able to package it and deliver it all the time. Now, delivering the situation comedy is an interesting thing because the pro-

gram will either be a hit or not a hit, it will either stay on or [001236] won't stay on. You must tie up all the elements of the program in order to assure the network that if he has a hit with the program he bought, that all the elements are deliverable year in and year out, for now, I think it's three-and-a-half or four years, it used to be for seven years, that you had to deliver, but I think they cut that off, it was onerous, so they cut it down to about four years, and you could tie up the people so that when a Gary Coleman, who is on "Different Strokes," rebels and says he wants to go to work some place else, he can't. I win, he just cannot. He is tied to that program contractually. He could retire and never work, and play out his option, in effect, but he can't—that's what he has to do, is work in that program, and he can't work on the program opposite, you have to get — so you get the deliverability of exclusivity, is the case in point.

With a sports package, you have to be able to deliver it. The N.F.L. is the classical case of being able to deliver, not only all the time, but the best games and on the best days.

Q. Now, Mr. Klein, does the network protect the advertiser on this market that he is trying to buy? A. Protect meaning —

Q. In price? A. Yeah — well, there is a — there's a negotiated price, the network comes in and tries to sell an audience [001237] at a thirty share, the advertiser wants to buy it at the lowest possible price, at twenty-five a share. They then negotiate a price, let's say it's based on anticipated twenty-seven share. Okay. That twenty-seven share now is guaranteed; that is, there is twenty-seven times the sets in use, yields a certain number of homes, circulation, and he has to — the network now has to guarantee that circulation at another negotiated price. The other negotiated price is the cost per thousand. He is going to deliver ten million homes at a five-dollar cost per thousand, so the advertiser now pays fifty

thousand dollars, and if nine million homes were delivered, then the network would owe circulation, two comparable circulations, incidentally, to that advertiser.

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[001246] Q. What is the role of competition in all of this market? A. Well, there's two kinds of competition.

The networks are fierce competitors, they compete with each other over the smallest thing. All try to get the money deliverable quantity.

[001247] Whether it be a movie star or a package that somebody puts on, or a movie — the bidding on "Star Wars" was enormous for the television sale.

They compete with each other viciously, but once they have got it, and once they have outbid their competitors and will only go up so high, unless they want to commit financial suicide, they will only go up as high as they think they can sell the program, the anticipated share, the anticipated cost per thousand, and so forth, and they multiple all those numbers and go up that high, and then once they get it, they want exclusivity, they don't want to be faced with a "M.A.S.H." on another network because it would be easy for Twentieth Century Fox to sell it to C.B.S. and turn around and say, "Okay, now, sell 'M.A.S.H.' to A.B.C. and N.B.C.," and then you have sixty-six episodes of "M.A.S.H." on opposite each other.

Q. So the exclusivity is an important factor in the purchase? A. Yes, almost absolute, almost absolute. You want to get a package and you want to get it without — you want to put it in a time period where it doesn't have to face its primary audience, that is the secret of scheduling, it's a very important thing. You want to put a female program opposite two male-appeal programs, and recently "Hill Street Blues" was doing well and C.B.S. moved a female program opposite it, and it's doing *better* than "Hill Street Blues."

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[001250] Q. You said only the numbers count on these programs, will you explain that to the Court? A. Well, during the hype period when a program is going on the air and everybody is talking about the program and how wonderful it's going to be, the best is yet to come, is an expression in television, but the day after the number is in, that's the only thing that matters. The day after the circulation is in, that's the only thing that matters. [001251] The only thing your advertisers care about is what your going to have to pay for it, so "Fame" was built up and puffed up and you will see that, but the day after it got to twenty-three shares — that is, "Fame," the twenty-three share of audience times the sets in use, et cetera, and then the circulation of that program is the only thing that matters. There is no aura any more to "Fame." It is circulation.

The day after it happens, that's the circulation — N.F.L. football on Thursday night or Sunday night is not a big thing, you know, they are a little embarrassed by it because it doesn't get the kind of numbers you get on Monday night, it's a different sport.

* * *

[001254] Q. Now, let's turn to sports programs, Mr. Kline, [001255] and tell the Court, if you will, where it fits into this general programming for television that you have been discussing? A. I have these ways of explaining, so you bear with me for a minute.

The television is broken into day parts.

On Monday through Friday time, because of the nature of the commercial atmosphere in the United States, the men go to work and the women stay home and keep house, in general. Now, this is not specific, but in order to reach men, you wouldn't go ten o'clock in the morning until five o'clock in the

afternoon, you would go something else, but if you wanted to reach women who are home and buy products that are used by women at home, you buy time at that time.

So that's where soap operas go. After five you have a prime time, but still basically women — the weekends, there's two parts of the weekend, early morning the kids — when I was a kid, Saturday morning belonged to me, not on television, but in the movies. And Saturday afternoon and Sunday afternoon are — men are available, and women are not, or don't have to be.

So that the parameter to the network, he is looking at this. He wants to fit programs to time periods, sports is perfect match, if he could figure out something else that was less expensive than sports that gets the men, he would do it.

But right now, that's the match that's — that he thinks [001256] works, and so he places that role. Sometimes they try to build sports into night time and one successful case was "Monday Night Football." There was nothing opposite "Monday Night Football" and A.B.C. and N.F.L. built that into what looks like a franchise that bought up — my son probably thinks the world was created with "Monday Night Football." He doesn't know any better, but I remember when Monday night used to be for sex.

* * *

[001257] Q. Mr. Klein, is the sports aspect of televising on network a part of the general programming that networks look at and use? A. Yeah, they use it and it happens to fit certain time periods, so they use it at certain times. They don't have it other time periods, so it's worthless on other time periods, but I brought up a couple of points before, if they didn't have sports, they would do something else, that's the expression in commercial television.

Last year there was — you know, N.B.C. and A.B.C. had a huge contract and the advertisers had millions of dollars — had millions of dollars of advertising, hundreds of millions of dollars of advertising, just based into a program scheduled for baseball. Baseball went on strike, that money didn't disappear from the market, N.B.C. got most of it by playing other programs, other sports programs.

[001258] The Sugar Ray Leonard fight, before he had his eye problem, was scheduled for Friday night on A.B.C., didn't come off, they played a movie, they made some money, but the biggest thing that ever happened in 1980, there was some four hundred million dollars worth of advertising committed to the Olympics, and we didn't carry the Olympics, it wasn't carried in the United States, and that money was spent elsewhere. Four hundred million dollars wasn't removed from this market, it was—it's in there. The F.C.C. reports all four hundred million was spent, you know, and more than that. And N.B.C. actually came out pretty good on it because they got the first shot at all that, and they repeated "Centennial" and things at that time and did very well with those replacement programs.

Yes, they would have liked to carry it, but they did not carry it, and that was the end of it.

There is not an absolute—you know, an advertiser determines whether he is going to buy that sports program, not the network. The network can't tell the advertiser to do this or that. The advertiser makes up his own substitutions. He says, "I will buy this program, if it's now too high, I will buy something else," like most sporting advertisers, in the fourth quarter, most of the—most advertisers who want sports go first to try to buy the N.F.L. for a full package. And if the N.F.L. gets too high, then they will go to the N.C.A.A. games.

[001259] And then if that gets too high, they will go to a combination of late season baseball, et cetera, et cetera. They

will play it out as best they can. If that goes too high, they will go to "Hill Street Blues" and go to "Saturday Night Live" which gets — actually, it's a better audience than N.C.A.A. football in terms of men eighteen to forty-nine, and they will go to "Sixty Minutes" and go to any place that gets them the same audience. It's very important to know that nobody, I believe, nobody, that watches N.C.A.A. football alone, and nothing else in this underspectrum of television, they watch N.C.A.A. football and a myriad of other programs, so that the advertiser can reach them in other places, and that people can't recall really where they watched the advertising. They can't recall they watched it in the football game.

Q. It is true that the sports programming, in general, then competes across the board with other programs? A. It competes for the advertising dollar because the programming is programming, you know, it's relatively fungible, it's hard to say that to people, but — because they have a commitment to their own programming, but it is fungible.

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[001271] Q. Now, what is the — what is the good feature from the price point of view, the network's point of view, of the N.C.A.A. football package — A. Well —

Q. — desirable feature? [001272] A. Well, one desirable feature is without that feature, I don't think it is madcap time, some organization in this case delivers the package, so that you could plan it and get your—get your share, somebody has to deliver the package.

Q. Is it a known quantity? A. And after it developed with exclusivity, so you don't deliver one against another, you know, half the package, in effect.

Q. But does it fall in the category of programming that you have described as having acquired a number? A. Right, it has acquired a number, it's predictable, rather predictable, not

perfectly predictable, and the rating went up a little this year over last year, but the men eighteen to forty-nine, went down ten percent, which is not good.

Q. What causes — just tell the Court how N.C.A.A. football has achieved this position it now has. A. Well, the way you achieve positions to be on for a long time, on a controlled basis, that you can keep your — if you would envision that all the N.C.A.A. football package is is a producer with a lot of actors, with a staff of actors, some of whom are lead actors and some of whom are supporting actors, and you have to satisfy all your — all your crew, and that's what the N.C.A.A. is doing. It's delivering a satisfactory mix of its actors, and keeping — not having them compete with each other, you know, not having Carroll O'Connor [001273] on two different shows. That would be — you know, what would happen — what happens if you don't have control — if you don't have exclusivity, by definition, you compete against yourself.

The N.C.A.A. with all its power and all the hype and all the promotion only has a twelve rating, which is — you know, nighttime, that would be a huge failure. And it only has a thirty-three share; that is, it can only amass a third of the audience in the place where it's been playing all these years on Saturday afternoon.

If you then divided it in half, you played it on station "A" and station "B" right opposite each other on the two goody-goody dates, you would drive that twelve — maybe I would work that twelve into a thirteen; that is, one would get a seven and the other a six, but it doesn't happen.

Last year, N.B.C. had exclusivity up until last year, on New Year's Night, for the Orange Bowl, and A.B.C. wanted to deprive N.B.C. of that exclusivity and they played the Sugar Bowl.

Q. You're speaking New Year's Day? A. New Year's Night, New Year's Night 1982.

Q. That was Georgia and Pittsburgh playing in the Sugar Bowl? A. One was Clemson and one was Georgia.

Q. Right. [001274] A. Georgia got absolutely wiped out in the space of the Orange Bowl, but they didn't increase the audience that much. You know, the football audience remained fixed, you know. It is a spectrum that is fixed and you can divide it two ways, three ways. They used to divide three ways. I remember when New Year's Day, it was a three-way division, you know, overlaps and all that.

But the less you divide, the more exclusivity you have to get your audience, the better the networks would like it, and the networks only like it because the advertiser likes it. He will pay for that. He pays for that exclusivity. He is not going to pay for it if he doesn't get it.

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[001276] Q. What about the N.C.A.A. television program, does that have a special appeal for television? A. Well, I think it's a matter of program fitting a time period. The day part — the N.C.A.A., because of the nature of college, the games are played on Saturday, and they were played on Saturday before — before television, and they still play it on Saturday, and the attractiveness to a — to a network and to the audience is that when they are — the [001277] audience is available and the network has its choice of all of these games and it could cherry-pick the best games.

Of course, the N.C.A.A. has these rules about not having multiple appearances, but the networks would pick the same, you know, the winning school over and over and over, if they had a free choice and, you know, they would make it "The Clemson Television Show," if they felt they could get the ratings, because they only care about — with all due respect to the N.C.A.A. and — all they only care about is the size of the audience. There's where they are going to make their money.

The difference between what they pay for the program and what they sell the program for, that's all they care about.

Yes, it sounds good, the N.C.A.A. sounds better saying, you know, than some cartoon, it's better than the smirking, but it doesn't have that much aura, because the audience, it doesn't have that aura.

Q. Is it a desirable feature of a package to be able to pick a particular game out of a series as the season builds up and it achieves more interest and significance? A. Yes, I think that's the big—you know, that keeps the package vital because if you were forced into—if you had a schedule, preplanned schedule, since nobody can predict the future, you wouldn't know whether the game is valuable on Saturday night, and that would be a terrible thing, so that you give the opportunity to a network to pick the best [001278] game. The N.F.L. does that on their afternoon games, as well, that the only—only the special games are predetermined, but—that is, the nighttime games and Saturday late season games are predetermined, but the—the second game, the national game for each network is determined late in the—late in the—early in the week of that—after the Sunday game, so they know, you know, that—whether they are going to get a good pairing and exciting game.

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[001282] Q. Mr. Klein, what, in your opinion, would be the consequence of eliminating the N.C.A.A. controls and opening television up to any college to make any deal at any time for the rights to its football games? A. Okay. I think this is what will happen.

The first thing that happens is you don't feel—there's nothing happening at the gate right away, that takes about a year, but the first thing that happens is that—on television [001283] it will happen, what happens at the Sugar Bowl and television—the first thing that happens on television, the one

game everybody free-balling agreements will sell their games. Now, Oklahoma could sell its game pretty good at the beginning because it's still a national enterprise.

But it will play opposite Pittsburgh, Penn State game, or whatever, try to avoid those confrontations, but it will play opposite some big game and a third network will have a game and maybe two ad hoc networks will have a game, maybe not as good, but two ad hoc networks have them. Now, you have this basic football audience, not too big, just a twelve rating, maybe you could squeeze it up to a thirteen or fourteen, but now, you're going to be dividing that three ways, at least, because N.B.C. would jump right in if once it was free-balling. If I were N.B.C., I would jump right in despite A.B.C. and C.B.S. But—so that instead of the twelve, thirteen, fourteen, fifteen that Oklahoma was getting with their big game, they are now—they will get a big number here in Oklahoma City and Tulsa—Tulsa, et cetera, but in Pittsburgh, not because they are not strong, if they had unilateral control over Pittsburgh, you know, they would—they didn't have opposition, they would get a good number in Pittsburgh, but they would play in Pittsburgh opposite, and the people in Pittsburgh, as much as they love Oklahoma, are not watching, are going to watch the Pittsburgh game, and they are going to play, [001284] as terrible as it sounds, in Boston against Harvard, it may not be worth much, but they will go in Boston, and they play in Miami against the Miami game, so instead of getting twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteens, they are going to get sixes.

Now, that's not too terrible, that's not so terrible, it's only terrible because it is now a sport that had a twelve and now when you open the papers has a six. And that is the problem, it's the perception of the buyer, "I'm not getting delivered. In order to buy what I used to be able to buy before, I have to now buy on three different networks."

And the production costs for the game still are going to be what they are called "glitzy" production costs, you still have

eleven cameras there and they are all going to cost a hundred and a hundred and twenty, two hundred thousand dollars to produce and somebody has to pay for that, and it's the advertiser, and the advertiser is not, so what will happen, he will pay less. Even if he pays the same cost per thousand, the colleges will receive less, and they will pay less and less because it will be an overexposed sport, like the fights, and essentially, you know, it will be a nice little local game, very good here, but as I said, in New York, nobody will know Oklahoma, nobody will know Georgia, can't tell them from Georgia-Tech.

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[001285] Q. Now, is the audience in the stadium, the gate, at a game of any factor at all, in television? A. Well, I think it is, and I think a very big one for packing the house.

We — you know, it is important to have a screaming crowd on hand. It makes the game a lot better. If you didn't — if they didn't pay, you would have to let them in for free or something. Because otherwise you don't want to look at a game that, you know, has — the people don't want to go to, you certainly don't want to look at it on television.

[001286] We did this in the beginning with "Saturday Night Life." We made it into a hot ticket, so we would have a screaming crowd, it eventually became a hot ticket, it was free. I think the fact that Ohio State, it's a hot ticket, and the people want to go there, it makes the games look better, the quality of football, who would know one team playing the other, you can't tell the quality. It's what the preception of the thing from a full stand is.

[001291] Q. Mr. Klein, are there other programs that are substitutable on television, on commercial network television, for college football? A. I think that many, many, many programs — and they are, they are substituted all the time, when all the minutes are sold out in college football, and

somebody wants to buy college football, he buys something else, by definition.

Q. Generally, what are those other substitutable programs? A. Well, obviously, other football is — professional football is probably — college football is probably substitutable for professional football, and then all the other sporting — sports available, and then programs that do very, very well in the same audience, carried demographics like "Hill Street Blues," "Saturday Night Live," "Sixty Minutes," and many, many, many more programs.

In fact, you could find some audience — some of college football's audience in any program, and that again, by definition, when you have one week the ball game does a twelve rating, and one it does a ten, and another week it does a fourteen, that audience comes from some place. It comes from the programs opposite. So those people on a day when there's a ten-rated program, are watching something else, and the same people that would have watched football are watching [001292] something else.

Q. So when the college football season is not on, do those advertisers who advertise on college football when it is on, stop advertising? A. They continue to advertise. They continue to look for the efficient buy against the audience that they want to reach, that's what they try to do.

Q. How wide is their choice in that regard? A. We have — every program on the air. They could buy any program they want, if it's not sold out. The only time somebody could raise a price on television is when they are sold out, and somebody is waiting in line to go in, and then you could raise your price; until that time, you can't do anything.

Q. What, in a general sense, is peculiar or unique about college football on television? A. The one unique thing is that the only place it works is the place it's plainly available. That is, on Saturday afternoon, when it plays. Out of Saturday

afternoon it has troubles, of course, because it has to compete against other programs. Saturday afternoons it is uniquely positioned, that's when the games are played, and that's when the audience is available.

The major thing about college football, unlike professional [001293] football which is programmed, in effect, is that this is an unprogrammed event. That is, college football is played nationwide, and any game is capable of being played nationally under the present system, and the network or the networks and the teams have the ability to pick a game and — a game that they are already playing, and televise it. And they have a natural audience for it, and even then, they don't do that well. But they do enough to worth — to be worth a sizable amount of license fee, as they are getting now.

They get a thirty-three share, thirty-two share, twelve rating, ten million homes — the games of some quality, not as good as pro football.

And they — their uniqueness is they fit in the time. If they were on Thursday, if games were played on Thursday afternoon, nobody would have heard of college football. And if they disappear on Saturday, something else will come in its place.

Q. And does this choice to the advertisers to substitute for college football extend beyond the sports markets? A. Absolutely. As I said, "Saturday Night Live" is a better vehicle for Datsun and Budweiser, I know Budweiser spends a lot of money on it.

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[001294] Q. Mr. Klein, do you attribute any significance to the twelve share and the thirty-three share and twelve rating of college football to the way it's packaged and sold? A. I think that we would be—if it were now on two networks, right opposite each other, we would be talking about a six rating and a seventeen share, or something like that, or a seven rating and eighteen share.

One would get—the better game would get a big share of the audience, and the poorer game would get wiped out. But a "little stronger" in television means a lot more rating points. So the success of this program, and all N.C.A.A. football is a program.

The success of this program is the packaging of it, and if you package it differently, you probably won't have success. You may have it; probably won't.

Now, you've got it in a noncompetitive situation, a most desirable situation, where it doesn't have to compete against itself, where it competes against other programs.

* * *

[001300] Q. So as it's packaged and supplied now — A. It's — it's a relatively expensive product, and the networks stand a chance, if business turns down this fall or next fall, or they get more competition and the ratings go down, their ratings go way down, they are going to take a bath.

If they get competition from themselves, they could go down to, instead of ten million homes, five million, six million homes. Their recoupment then will be at eleven thousand a thousand, eleven dollars a thousand — just doesn't occur in commercial television. Rarely occurs, rarely occurs.

So they are looking at a very — could be a disparity situation, but if they got competition from themselves, they would give up their contract. They would say, "That isn't the deal, the deal is exclusivity, that's why I am paying you all this money."

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Q. We were asking before lunch about the feasibility [001301] of continuing with the network series, if controls were removed and N.C.A.A. members were allowed to televise their own games freely. What is your opinion as to the continuance

of the network service? A. As I said before, I just — I sort of alluded to it, if the network has a show that they bought for exclusivity and predicted ten million homes, and paid this kind of license fee for it, and suddenly all over the country they had fairly good competition against them, locally, they would, one, not get the ten million that they probably would have to guarantee to the advertisers. And, therefore, they would say, "I am not doing it, I just can't afford to pay you this kind of money for that — for those programs."

So what you would have then is just local — local football, or they would go out and negotiate lower prices for the national games. They would negotiate prices based on that same five, six dollars that I talked about, for lower ratings, and that's all that would happen.

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[001303] Q. Would it be your opinion that there would be any way of matching the present system of national scheduling and orderly marketing if, in fact, the controls were removed? A. You couldn't do it. You couldn't deliver that, and what you delivered would be lower-rated, and automatically that would be no — the networks say this all the time, they don't want to have competition to the thing that they bought. They want to have no competition to the thing they bought. And so that you will convert whatever the value is of it, you [001304] would convert a good national service that you built through your own controls, so to speak, into a fairly random local business, which maybe Oklahoma will do okay in, but certainly Oklahoma State will get wiped out.

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[001304] *Cross Examination by Mr. Muchmore:*

Q. Mr. Klein, your testimony then is that A.B.C. is paying extra for the packaging that they get, over what they would pay if there were more college football television available on Saturday afternoon? A. Extra, or hundred percent extra? Meaning infinity extra. They may not buy it if they had to compete against it locally, for two reasons:

They would have a low-rated show, and some of their affiliates — some of their very affiliates that they would want to carry the football show, the football game, national game, would be carrying a local game that they, themselves, [001305] want.

Q. So what we are saying, then, is that the N.C.A.A., in their wisdom in the past, in restricting the number of games available on television, has been able to keep the price at a higher level? A. Yes, just like maybe restricting its number of episodes keeps the price at a high level, just like any program.

Q. Now, it's your testimony that for all the hype college football now gets only about a twelve share, is that not correct? A. Twelve rating, thirty-two, thirty-three share.

Q. Excuse me. I made that same mistake. Twelve share means twelve percent of all T.V. homes, right? A. Twelve rating means twelve percent of all T.V. homes.

Q. And twelve share, or thirty-three share, means thirty-three percent of those actually watching T.V.? A. At that moment.

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[001307] Q. And, yet, you stated that when you were with N.B.C., that N.B.C. bid on college football? A. Right.

Q. But you said they didn't get it, because, as you put it, "A.B.C. really wanted it"? A. Right.

Q. Is that correct? A. Right.

Q. And, in fact, C.B.S. has now bid for and gotten a package of college football television? A. Right.

Q. And you testified to fees they were allowed to—N.B.C. would get for it? A. Right. They did, N.B.C. did buy it, I mean, they wanted an N.C.A.A. package. You know, they want it, why not?

Q. I mean in — A. At their price, at the price they want to pay.

Q. It was your testimony, was it not, that if the controls were turned loose, that N.B.C. would bid for it in [001308] addition tc the other two networks? A. There wouldn't be any N.C.A.A. football, but they would bid for football games, sure. Why not? Because they have zero now, so they would have a huge improvement; the other two guys would have a decrease.

Q. And you said that if you were N.B.C., you also would bid for it? A. That's right.

Q. Well, sir, if it is — A. Not — what is it that you are talking about? Not the football, bid for individual games. You are talking about — there's a difference — this is not N.C.A.A. football. This is a different situation, that I would go to Oklahoma and I would bid for a game, right. And so — and then I would go — if I didn't get that, I would go to another school and bid for a game. If I didn't get that, I would go to another school and bid for a game.

And what would happen, Oklahoma would be on opposite the other game, and the other game —

Q. Now, sir, you also testified that of all the viewership on television, N.C.A.A. football is about one percent. Am I not correct? A. Right.

Q. Maybe less? A. One percent, N.C.A.A. nonbowl games, yeah.

[001309] Q. One percent. But the cost of acquiring and putting on N.C.A.A. represents about two-and-a-half percent of the network's cost? A. That's right.

Q. They are paying two-and-a-half times as much per rating point for N.C.A.A. football, aren't they? A. Absolutely. That's why they get in trouble. They pay a lot less on "General Hospital," and they make a hundred million dollars. "General Hospital" pays for their N.C.A.A. football.

Q. Why, Mr. Klein, if A.B.C. is barely breaking even on N.C.A.A. football, and why if they are paying two-and-a-half times as much per rating point, why is it that A.B.C. still, as you put it, "Really wants it"? A. No, that was in 1964. I assume they really want it now, or they probably want it, but —

Q. Why do they want it at all? A. They want it because they think they could make money on it, and it's very difficult to come up with programs that fit that day part, that Saturday day part.

Now, they want Sunday football, too, but they don't have it. But they have Monday night football. They built "Wide World of Sports" because they didn't have football, and they built a very successful franchise on "Wide World of Sports" in 1963. It's a very successful franchise, to [001310] play opposite pro football, they built that to play opposite. Roone Arledge and Allie Sherman built that program, they know how to build programs. Or it might be less expensive for them, even though it's costly, to buy an existing program where there's a track record. You know you are going to get the advertisers. And that — even then, your loss — if their losses are predictable, you build a new program, it costs you half as much money, and you could get a zero rating.

So that — you are buying what is called "insurance" or "protection" when you buy an existing property.

• • •

[001311] Q. And isn't it important to A.B.C. to be able to say at various times in the week, "We are the network that brings you college football"? A. That probably — that's a very important thing, if you could deliver it, they will be glad to say it.

Q. And that was one of the advantages that C.B.S. saw in getting into this marginal situation, too, was it not?

[001312] A. I think so. But C.B.S. has done a lot of strange things. They went into C.B.S. cable, too, so — yes, they wanted to. They have bought a lot of—they bought a lot of sports, they bought N.C.A.A. basketball, and they bought this, and they paid an enormous amount of money for the N.F.L. They are very heavy in sports programming.

Q. And part of that is because network image in sports is important to them? Whether you agree with their wisdom or not, it is important to them, is it not? A. At the time that they make it, it's important to them.

* * *

[001313] Q. Don't the networks generally, though, even if they are ahead in prime time, don't they worry about how they are doing at other times? A. They are worried less if they are ahead in prime time.

Q. But they worry, just the same, don't they? A. They worry about every time period, right.

Q. And one of those time periods that they worry about is Saturday afternoon, is it not? A. Are you — but — college football afternoons, because they only have to worry three months about that. They have nine months not to worry, or worrying about something else in this time period.

Q. My question generally, isn't one of the time periods [001314] the networks look at and worry about is Saturday afternoon? A. Yes, one of the minor time periods.

Q. And that's one of the time periods that they would like to be able to fill, and fill with something attractive? A. Right.

Q. Is that not correct? A. Right. Right.

Q. And what has been the network competition over the last five years, generally, on fall Saturday afternoons? What have the three networks been showing? A. Basically, one network carries — in the fall?

Q. Yes, sir. A. One network carries for the early part of the fall, N.B.C. would carry the baseball games up until the time the World Series was over, and then C.B.S. would make up a sport, and A.B.C. would have the football games.

Q. All right, sir. And it's your testimony that C.B.S. makes up sports to televise in the fall, or has in the past? A. Yeah. They buy — they buy occasional tennis matches, golf matches, and things like that. And then they do "Sports Saturday," I think they call it "Sports Saturday."

Q. How many hours of programming has C.B.S. shown in the recent years on Saturday afternoon? A. How many hours in recent years?

[001315] Q. Yes, sir. Last year, how many hours of programming did C.B.S. show on Saturday afternoon? A. From what time to what time?

Q. How was Saturday afternoon defined in the industry? A. One to five.

Q. All right. A. About half of that time, their program.

Q. And isn't it a fact that now they are buying college football television, that they are going to have to seek increased clearances from their affiliates to show that additional programming? A. Pretty easy to clear it.

Q. I understand that, but they are going to need to do it, aren't they? A. They did it, to clear it. I mean, they did it for the stations.

Q. My point is, as far as half of Saturday afternoons go in the past, C.B.S. has been dark, haven't they, Mr. Klein? A. They have been partly — half of the time they have been dark, yes.

Q. And now they are brightening that darkness with N.C.A.A. football? A. Half the weeks. Half the weeks, sir. Half the weeks, only.

Q. Pardon me? [001316] A. Half the weeks are they troubling at all.

Q. What is your understanding on that? A. Well, here, on the time — the early game, what did they do opposite — what are they doing opposite N.C.A.A. football?

Q. Well, wouldn't you assume they would be doing whatever they did with the half of the afternoon it wasn't dark before? A. So if they increased it that much, I guess — they are going to be noncompetitive again, your case against the other half, as well A.B.C.

Now, if they both carried games, they both carried doubleheaders, then they would both be filled up, right, and then the three networks carried, they would all be filled up with games.

Q. How has N.B.C. football done in the Saturday afternoon battle against the other network programming? A. Pretty good.

Q. What kind of shares has the made-up sports events you were talking about gotten for C.B.S.? A. They didn't clear it that well, probably in the twenties, low twenties. I tell you, the World Series did pretty well.

Q. That's about one Saturday, or maybe two? A. Two — sometimes it's two Saturdays, and the [001317] playoff games might be another Saturday, right, they do okay. The end of the season does okay.

* * *

[001322] Q. All right. Now, I am not limiting you to Michelob, I am asking, is it not true that there are some things that advertisers say, "We would like to have advertised on weekends"? A. Yes. I think Saturday is the worst day for advertising, to be perfectly honest about it, because the stores are closed on Sunday, and it's a very difficult day to recruit advertisers. It's a troubled day. It's good for kids' advertising.

Sunday is a terrific day for advertising, because you got the whole week in front of you. All the car companies like to advertise on Sunday. The car companies don't like [001323] to advertise on Saturday, because the showrooms are closed, but I think now life has changed.

Q. Chevrolet manages to overcome that, don't they? A. I — I cited that before. I thought that Chevrolet was taking that position in the N.C.A.A., really — and keeping the other guys out. By taking the position and buying enough of it to get an exclusive in the market did not insure themselves a successful car year, and they got beaten by guys who could not be in the N.C.A.A. football game, who found the substitute.

Q. You are saying — A. Datsun and Toyota and Honda, and everybody else found the substitute, and still beat them.

Q. My question, Mr. Klein, was Chevrolet wanted to advertise on Saturday afternoon, didn't they? A. Right, and they — and they bought a position, and they didn't do that well.

Q. Well, whether or not you think they are wise, they wanted Saturday afternoon, didn't they? A. Right.

Q. And as a matter of fact, they wanted it badly enough to pay extra to exclude the other car dealer from Saturday afternoon? A. Right. That was a marketing decision.

Q. And in your opinion, the other car dealers didn't [001324] want Saturday? A. They might have wanted it, too, but they got lucky by not getting it.

Q. But Chevrolet thought they wanted it? A. Yes, and so they did.

Q. And they paid something extra in order to have that exclusivity? A. Right.

Q. My question was, aren't there some products — some products, not all, not most — some products that they like to advertise on weekends, including Saturdays? A. Some products on Saturdays, yes, some. Some products on Saturdays in the fourth quarter, some products on Saturdays in the first quarter.

* * *

[001325] Q. Now, you testified that you can't have it both ways, that you either are going to have football exclusively on one or maybe two national packages, or you are going to have it locally. That's your prediction of what we would have if we turned it loose, is that not essentially right? A. I say that if a network bought a package and they had to play it in every market in the United States, or virtually every market, or in the best football market, opposite local football, then they would not get an audience [001326] that they had contracted to buy.

So they will now lower the price of these national games, and lower and lower and lower them, and eventually they will not be able to deliver a critical mass of audience, a network audience. That is not to say I put no value on that. I am not saying this is good or bad.

What you have now is a national program called "N.C.A.A. College Football," that's what you've got. You won't have it if you have the local games competing against the network programming. You just won't have it.

Q. You can't have both a national program and a local program of N.C.A.A. football? A. Competing against each other, you cannot. You won't have it.

[001328] Q. Would you agree, or not agree, that next to professional football, the number one continuous sports series on all of television is N.C.A.A. football? A. I — you know, I believe it's major league baseball, but, you know, in terms of gross amount of viewing of the sport, and dollars, I think baseball, the number of hours presented and the amount of audience watching baseball is greater than N.C.A.A. football.

Q. All right. I guess I should have asked the number-one rated program, as far as a continuous sports series? A. Outside —

Q. Outside the N.F.L. football, that's college football? A. Yes, outside of — yes, I think N.F.L. football is two sports, really, the N.F.C. and A.F.C. The N.F.C. is fifteen-something rating, and A.F.C. is something about the same, a little — a smidge better than N.C.A.A.

But they have big play-offs, they have tournaments, and the tournament is the nature of the game. That's another [001329] problem that you are going to have breaking it up. I put no value on it, but what the N.F.L. does is build on a tournament, what major league baseball does is build towards a play-off where you have a large number of games played between — for huge audiences. You wouldn't have that in a fragmented system, you just wouldn't build that way in a fragmented system.

Q. Well, you said that A.B.C. likes to have the exclusivity that they have had under the present arrangement? A. Right.

Q. And they—that they would—and I guess you would agree, then, that the arrangement as it has been, has been a good thing for A.B.C. because of the exclusivity, they have benefited from time to time? A. I think they like it because it's exclusive. They wouldn't like it if it was not. I think they don't like it as much, now.

Q. The networks like it and the advertisers like it, because they can go to one place and buy that twelve share, instead of having to look around to a half-dozen different places, isn't that right? A. Yes, it's a twelve rating.

Q. Fine. I apologize, that's a mental block. I am sure I understand that. A. That's why I make a living, everybody has their [001330] mental block.

Q. Twelve rating, then. Well, let's go back. The advertiser, as well as the network, like it because they are buying, they can buy that twelve rating in one lump, instead of cutting it up, right? And the colleges like it, or in your opinion they should like it because the packaging, and that means the exclusivity, has allowed them to put on a more viable program? A. They should — I don't make any value judgments whether they should like it. I am talking about that this is a program that has been packaged in a certain way, and it plays that way, and it's successful that way. If it played a different way, it would be a different program.

A lot of things would happen that I say would make it weaker; that is, there would be a lot of it around, that — that it would compete against each other, and the perception of it would be as a weak sport. It would look a lot like hockey.

You know, in Canada, they have hockey nights in Canada, and they have exclusivity, so the ratings go big. In the United States they don't have such a thing, they have franchises playing hockey all over. They get very, very low ratings. They cannot control the output of it, so you make it a weaker sport. Not that hockey would be such a big sport here in the United States, but you would make [001331] college football a weaker sport.

There are some clubs that will survive for a while, but the perception of the sport will be as a low-rated, fragmented local or regional venture, and that's the way it would look. It would look like a local or regional theater, or anything that is local. It will not be the big thing it used to be.

I have no — I don't care, you know, if that happens. I am just saying that that's what is going to happen. It has nothing to do with anything, that's what is going to happen.

Q. Let me put it another way: there are benefits, then, from the exclusivity arrangement for college football? A. There are benefits to — as a program, to exclusivity, absolutely.

Q. Just as there are benefits to the networks? A. Networks want to buy exclusivity. They have bought nonexclusivity, local stations have bought it, they are fighting like crazy to get rid of Ted Turner because he takes "Happy Days" from Atlanta and brings it all the way into Oklahoma City, where it plays on a local station, so the local station is crying bloody murder they want Ted Turner away from there. They want exclusivity on "Happy Days."

Everybody seeks, in television, exclusivity.

Q. Apart from the benefits to the networks and the [001332] advertisers, and to the colleges, tell me what the benefits are to the sports fan who wants a choice of games and wants to be able to watch his local football team play? A. That is a problem. It's like a lot of benefits, that there is no benefit to the public to have only two games in New York, N.F.L. games.

* * *

Redirect Examination by Mr. Harry:

* * *

Q. On your cross examination, you gave a figure that I believe was different from that which you gave on direct, and I would like to see which one is correct here. [001333] A. Right.

Q. I think it involves the amount that A.B.C. paid, the percentage of all programming that A.B.C. paid for the N.C.A.A. series last year. I think the numbers you originally

gave me were thirty million for the N.C.A.A. package, and three million [billion] for all programs?

A. Yes, one percent of the total programming.

Q. So if you said two-and-a-half percent to Mr. Muchmore —

A. Well, it was two-and-a-half percent, I was thinking of the — of the — what it accounts for of the total sports program. It's not—actually, that's all the networks put together, the three million [billion] dollars.

Q. So that the percentage paid for N.C.A.A. of all programming was one percent?

A. Right, one percent, but it's, you know, on the —

THE COURT: I believe he testified concerning college football compared to all programming.

* * *

Office Supreme Court U.S.
FILED
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No. 83-271

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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September, 1983

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QUESTIONS PRESENTED

NCAA's statement of the questions presented tends to misrepresent the bases of the decision for which review is sought. Respondents therefore present more accurate versions of NCAA's questions presented.

1. Whether an agreement among universities to establish television packages for football may be held unlawful *per se* when it fixes prices, suppresses product diversity, restricts output, poses substantial risks of cartelization and vertical forecloure, restrains trade more than necessary to promote the efficiencies of the integration, and constitutes the combination of virtually all producers of commercially salable intercollegiate football.

2. Whether an antitrust defendant may obtain a rule of reason analysis for otherwise *per se* illegal restraints by asserting that such restraints are ancillary to other purported goals, without showing the goals are procompetitive, and without showing the restraints are reasonably necessary to the attainment of such goals.

3. Whether the district court's finding, affirmed by the Court of Appeals, that NCAA has sufficient market power to produce anticompetitive effects through its controls over its members' football television rights is clearly erroneous.

4. Whether a combination by virtually every producer of commercially salable intercollegiate football to sell broadcast rights only as a package, on an exclusive basis, to a limited number of buyers, and restricting the total number of games sold, should be treated as a suppression of competition although the package is sold by a process of competitive bidding.

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in pertinent p. rt: "Every person who shall monopolize, or attempt to mo opolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

STATEMENT OF CASE[1]

NCAA's statement of the case does not accurately reflect the holdings of the district court and Court of Appeals.

[1] This statement of the case will be referred to in argument, and is numerically paragraphed for this purpose. (*E.g.*, "Statement, ¶ "). Abbreviations are also used for NCAA's Petition for Certiorari ("Petition at ") and references to the opinions of the district court and Tenth Circuit in NCAA's Appendix ("D.C. a; 10th a"). References to Respondents' Appendix will always end with a capital letter (*E.g.*, "*App.* B").

Respondents therefore restate the bases upon which NCAA's television controls were found illegal by both courts.

1. Although NCAA has permitted all the other sports it regulates to operate in a free television market (D.C., 47a), it has controlled football television since 1953 (D.C., 44a). Until 1982, after this action was instituted, NCAA sold a single network the exclusive football television rights for all of its members; from 1965 to 1981, ABC was that network (D.C., 45a). NCAA's present contracts, for 1982-1985, sell exclusive television rights to two networks and one cablecaster, and will operate substantially the same as NCAA's previous contracts (D.C., 61a).[2] Under NCAA's controls, the contracting network(s) pay a "minimum aggregate fee" (D.C., 57a, 61a; 10th, 2a). Part of this minimum aggregate fee is paid directly to NCAA, and the rest is paid to schools whose teams are televised (D.C., 56a). NCAA, after subtracting the amounts allocated to its championship football telecasts, "recommends" [3] that specific uniform amounts be paid by the contracting network(s) for national and regional telecasts, and NCAA recommendations are always the minimum and maximum amounts actually paid for any individual game (D.C., 56a-57a; 10th, 7a). NCAA also sets the minimum and maximum total number of permitted telecasts and the maximum number of appearances per school, and prohibits the sale of football telecast rights outside the NCAA contract with very limited exceptions (D.C., 58a-64a; 10th, 2a-3a).

2. NCAA membership is essential to an institution "wishing to sponsor a major, well-rounded athletic pro-

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[2] NCAA's 1982-1985 contracts with two networks "eliminate any possibility of competitive bidding between the networks" (D.C., 62a). "NCAA substantially dictated the terms under which both networks could televise NCAA football. The networks were offered a take-it-or-leave-it proposition" (D.C., 61a).

[3] NCAA began using the word "recommend" rather than "set" in describing its activities regarding rights fees for individual games in 1976, at the direction of its Executive Director (D.C., 78a).

gram", and affects not just football, but virtually all sports (D.C., 53a-45a). This action was precipitated when the College Football Association ("CFA"), consisting of five major football-playing conferences and 61 independent schools, also members of NCAA, attempted to develop an independent television plan with the National Broadcasting Company ("NBC") while NCAA was negotiating its television plan with NBC's competitors (D.C., 49a). NCAA reacted immediately, consolidating its power in 1981 by adopting a bylaw "official interpretation" (later to become the content of the bylaw interpreted) that: "The [NCAA] shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season . . ." (D.C., 49a, 111a). The NCAA publicly threatened CFA members with a myriad of sanctions ranging from reprimand to expulsion, affecting not only the football programs of CFA members but other sports as well, and stated that it would seek expedited disciplinary procedures against offending CFA schools (D.C., 51a). NCAA suspended its "campaign of veiled threats and coercion" only after the district court ordered it to do so (D.C., 126a). The CFA contract failed, nevertheless, substantially because of the NCAA intimidation of its members that had already occurred (D.C., 51a, 126a; 10th, 22a).[4]

Price-Fixing and Restriction of Output

3. The district court found that NCAA, through its "minimum aggregate fee", has set the "minimum, maximum, and actual price" paid for the telecasting rights of its members' games (D.C., 87a, 113a); that NCAA controls distort the prices which would otherwise be paid in a free market, and the "raison d'etre" for their existence is to

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[4] This action was originally filed as a class action on behalf of the members of the CFA; NCAA opposed class certification, and when the CFA-NBC contract failed, plaintiffs withdrew their application for class certification on the ground it was no longer needed to protect the interests of the class.

restrict competition (D.C., 93a, 114a);[5] that the prices paid for telecasting rights "is responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[t]he controls restrict the number of games shown by local telecasters far below that which would be shown in a free market" (D.C., 114a); and that because of the controls, "[m]any games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised" (D.C., 115a).

4. The Tenth Circuit held that NCAA has fixed the minimum and maximum total prices for the NCAA television packages (10th, 7a); that the compensation paid by the networks "does not vary from game to game" (10th, 7a); that NCAA's controls consist of "two groups of restraints, those that create an exclusive franchise arrangement with the networks and those that distort the prices paid for the individual games" (10th, 11a-12a); that both the grant of exclusivity and the distortion of prices appear anticompetitive (10th, 12a); and that NCAA controls potentially reduce output of desired products and increase consumption of less desirable products (10th, 10a). The court also noted and relied upon the district court's finding "that without the restraints imposed by the television plan more games would be shown at the local level" (10th, 21a).

5. Both courts addressed NCAA's contention that it should not be subjected to *per se* antitrust scrutiny because its restraints had procompetitive justifications, and were incident to a joint venture.[6] As to NCAA's argument that

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[5] More specifically on the latter point, the court found that the purpose of NCAA's controls is to obtain an artificially high price by restricting output and fixing prices (D.C., 79a, 112a).

[6] Both the district court and Tenth Circuit discussed NCAA's purported justifications in the context of a *per se* analysis and rule of reason analysis. Since the findings of the courts under each standard partially overlapped, they will all be summarized here and not repeated separately in discussing the courts' findings under the rule of reason.

athletic competitive balance was promoted by the television restraints, the district court found that "NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members" (D.C., 70a); that the other extensive regulations of NCAA over its members were sufficient to maintain athletic balance (D.C., 70a, 97a); that NCAA controls contribute only indirectly, if at all, to this goal (D.C., 110a, 115a); and that the "marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy" (D.C., 109a).[7]

6. The Tenth Circuit, addressing NCAA's athletic competitive balance justification, held that it appeared to be a noneconomic justification which could not justify a restraint on competition (10th, 11a); that the NCAA appeared to be advancing the impermissible argument that economic competition would destroy the market (10th, 11a); that the district court found on adequate evidence that athletic balance could be achieved by less restrictive means (10th, 11a); and that in fact, since NCAA controls suppressed the number of local broadcasts, eliminating the controls would have the effect of equalizing revenues among NCAA members (*Supra*, note 7).

7. As to NCAA's argument that its restraints increased live gate attendance at its members' games, the district court held that NCAA controls have no effect on gate attendance (D.C., 68a, 107a, 115a), and in any event NCAA does not employ its restraints in order to protect gate at-

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[7] NCAA argued its television controls helped its less prominent football playing members obtain television exposure and revenues. Significantly, the district court found that without NCAA's controls, many more games involving many more schools would have been broadcast, particularly at the local and regional levels (D.C., 59a, 66a, 91a, 114a, 118-119a). The Tenth Circuit, noting and relying upon this finding, held that "[t]his would have the effect of equalizing revenues" (10th, 21a).

tendance, but rather to maximize television revenues to its members (D.C., 69a-70a, 108a, 109a). The court held that "the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest" (D.C., 70a).

8. The Tenth Circuit, addressing NCAA's argument that its restraints promoted gate attendance and therefore total spectator viewership of football games, held that it was doubtful "that the output may be properly characterized as viewership" (10th, 10a); that even if it is assumed viewership is output, total viewership — both live and televised — should be considered, and there was no evidence in the record to permit total viewership to be gauged (10th, 10a); that even if total viewership was enhanced, it did not justify NCAA's restraints because it came at the expense of other options by reducing output of desired products and increasing consumption of less desirable products (10th, 10a); and that the restraints were broader than necessary to achieve NCAA's professed goals (10th, 11a).

9. NCAA also contended that its controls facilitated the marketing of college football television by a system comparable to that approved in *Broadcast Music, Inc.* v. *Columbia Broadcasting System*, 441 U.S. 1 (1979). The district court held that the most important distinction between the *Broadcast Music* arrangement and NCAA's is that NCAA members have been forced to agree by the will of the majority not to contract outside NCAA's television plan (D.C., 93a). It held that "[t]he networks pay the extraordinarily high price they pay for NCAA football because of the guarantee of exclusivity" (D.C., 91a); that NCAA's witnesses were not even able to "articulate any credible reason as to *why* it is necessary for NCAA to act as an exclusive agent with the authority to bind all NCAA members to an exclusive contract" (D.C., 96a); that "NCAA controls are not necessary for the protection of NCAA's

members' right to sell their football games for broadcast" and "many more games would be televised in a free market than are televised under NCAA controls" (D.C., 90a-91a); and that college basketball television is exemplary of the fact that college football will continue to be shown even on the network level without the interference of NCAA (D.C., 76a, 48a).

10. The Tenth Circuit, distinguishing this case from *Broadcast Music*, held that here, "the new and different product . . . comes at the expense of the product that would otherwise be offered by the schools" because the "schools are not permitted to sell outside the network contracts" (10th, 14a);[8] that the contracts restrict the total number of games to be broadcast (10th, 14a); that even the NCAA package is sold on an exclusive basis whereas in *Broadcast Music* an unlimited number of blanket licenses were offered for sale (10th, 14a); and that because of the character of the NCAA restraints, "those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market." (10th, 14a).

Group Boycotts

11. The district court found two forms of group boycotts. "First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters" (D.C., 67a). "There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS" (D.C., 103a). Second, non-members of NCAA cannot appear on television against NCAA members (even outside the NCAA television package), and so "NCAA controls in effect deprive the non-member of the means of producing its final product, a football game" (D.C., 102a, 68a). This

[8] The district court similarly held that the "NCAA has made itself the single seller in the relevant market of college football television, at the expense of the individual sellers" (D.C., 74a).

forces the non-member to attempt to compete against a monopolist (D.C., 54a).

12. The Tenth Circuit held that NCAA members' agreement between themselves and a few members of the television industry to refuse to deal with the remainder of the television industry did not constitute a group boycott because "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a). The Tenth Circuit held that NCAA members' refusal to appear on television with non-members was not a group boycott either. The court focused on the NCAA rule as an "expulsion sanction" which appeared "to be an enforcement mechanism and not a sham for an anticompetitive purpose" (10th, 25a).

Rule of Reason

13. Both the district court and Court of Appeals evaluated NCAA's television controls under the rule of reason, with the observation that doing so would not offend the interest in litigation efficiency in this particular case (D.C., 105a; 10th, 15a). The district court found that "the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices" (D.C., 107a); that "[t]he controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they may not" (D.C., 113a); that "NCAA has commandeered the rights of its members and sold those rights for a sum certain", making the price paid for their television rights "responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[f]ewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls" (D.C., 114a); and that "the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive

absolutely no benefit from the controls" (D.C., 115a). The district court concluded that there were no redeeming procompetitive benefits (including protection of gate attendance or preservation of competitive balance) that outweighed these adverse effects on the free market (D.C., 115a).

14. The Tenth Circuit concluded that the NCAA television plan increases concentration in the marketplace, prevents producers from exercising independent pricing and output decisions, precludes broadcasters from purchasing a product for which there are no readily available substitutes, and facilitates cartelization (10th, 22a). The court found that NCAA's assertions of procompetitive benefits "do not overcome the anticompetitive effects of the restraints" (10th, 20a-21a).

15. Both the district court and Tenth Circuit concluded that NCAA had market power over collegiate football television, primarily because of the unique demographic composition of the audience — middle aged male college graduates in the middle to upper income brackets (D.C., 77a, 75a; 10th, 18a). The district court said, particularly, that "[i]t strains credulity to suggest that broadcast programming does not consist of submarkets" (D.C., 76a), and both courts agreed that Saturday afternoon college football television was a relevant market (D.C., 71a-78a; 10th, 18a-19a). Both courts pointed out that Saturday afternoon programming consists largely of sports, cartoons and old movies (D.C., 72a; 10th, 18a); that the most logical substitute for college football, i.e., professional football, is precluded from televising on Saturday afternoon during the college football season by the strictures of its own television antitrust exemption granted by Congress (D.C., 71a, 121a; 10th, 19a); and that other professional sports, e.g., baseball, were not substitutable with NCAA football (D.C., 75a; 10th, 18a-19a). Both courts noted that advertisers spend two and a half times more per viewer to advertise on NCAA football than on the average for other pro-

gramming (D.C., 75a, 120a; 10th, 18a); and that the unique appeal of college football was indicated by the fact that CBS frequently offered no programming at all, i.e., "went dark", in the last few years when ABC had exclusive rights to televise college football (D.C., 72a; 10th, 19a). The district court observed that "ABC was willing to suffer a net loss in televising college football for the benefits it derived from being affiliated with the sport" (D.C., 75a), and the Tenth Circuit held that the networks "need" college football "programming to offer on Saturday afternoon" (10th, 19a).[9] The district court pointed out that ABC and CBS have agreed to pay dramatic price increases [10] for college football programming in the present contracts (D.C., 122a-123a).

Monopolization

16. The district court found NCAA in violation of §2 of the Sherman Act because it had unlawfully obtained monopoly power in a relevant market (D.C. 124a-125a). NCAA did not argue either in the district court or the Court of Appeals that, if it had monopoly power (turning on the question of market definition), it had obtained it lawfully (D.C., 124a-125a; 10th, 20a n. 16). The Tenth Circuit, while affirming the district court's market definition (10th, 18a), found it unnecessary to consider the monopolization claim separately because it "would not affect the scope of the relief granted" (10th, 20a n.16).

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[9] The Tenth Circuit, besides upholding the district court's finding that college football constitutes a unique type of Saturday afternoon programming (10th, 18a), *alternatively* held that even assuming the district court's market definition was too narrow, the evidence showed NCAA to possess enough market power over televised intercollegiate football to make "the risks of cartelization and price enhancement . . . imminent" for purposes of a rule of reason analysis (10th, 20a).

[10] In 1982, the networks paid 62% more per exposure, and 32% more per commercial minute than they did the previous year; by 1985, they would pay 100% more per exposure and 61% more per commercial minute than in 1981 (D.C., 123a).

SUMMARY OF ARGUMENT

Review of this case would be meaningless, given NCAA's prospect of prevailing. Even had both lower courts erred in applying a *per se* analysis, NCAA could gain nothing by review. Both courts held that the NCAA plan failed rule of reason analysis, and these findings are fully grounded on clearly supported factual determinations. Moreover, NCAA would have to persuade the Court that its conduct did not constitute either of the two species of group boycott found by the district court. Finally, the district court's finding of relevant market, held by the Court of Appeals to be supported by the evidence, would have to be overturned to avoid a finding of a violation of §2 of the Sherman Act.

The facts found by the lower court, which the NCAA claims not to challenge, establish beyond argument conduct which has universally been condemned to be in *per se* violation of §1 of the Sherman Act. NCAA may not escape such condemnation by mere assertion that it constitutes a beneficial integration of marketing functions, or by reference to its status as a non-profit regulatory organization, where its anticompetitive conduct is not reasonably necessary to the former, and is virtually unrelated to the latter. The conduct allowed rule of reason analysis in *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979), involved none of the pernicious aspects of NCAA's football television plan.

The observation of the Court of Appeals that a party asserting procompetitive benefits ancillary to a partial integration has the burden of proving them is fully in accord with the case authority, including *Broadcast Music*, and with common sense. Moreover, the burden of proof had no impact on the lower courts' *per se* findings; those findings were never in doubt. Further, the Court of Appeals' reference to burden of proof was not even arguably applicable to the findings concerning relevant market or rule of reason, and respondents were found to fully satisfy their burden on these issues.

The lower courts' findings as to NCAA's market power are overwhelmingly supported by the evidence; NCAA has no prospect of overcoming "the almost insurmountable burden" of demonstrating them clearly erroneous. , Both courts not only applied the proper legal and economic tests of market power, such as substitutability and submarket analysis, but also determined directly from NCAA's output and pricing behavior that NCAA has market power.

In the face of the overwhelming array of anticompetitive effects of NCAA's television plan, and particularly in view of the findings that NCAA acquired its status as exclusive marketer of college football television by exploiting its power as a regulatory authority, NCAA has no prospect of overturning the rule of reason determinations of the lower courts. Both lower courts properly rejected the proffered procompetitive benefits of NCAA's controls both legally, as not truly procompetitive, and factually, as contrary to their explicit and fully supported findings.

ARGUMENT AND AUTHORITIES

Underlying the NCAA's defense of this case, in the lower courts, in the press, and in the university community, has been the stated or unstated assertion that social disruption, in the form of the demise of amateur athletics, and perhaps even the NCAA itself, is a necessary result of the decisions of the courts below. Uncritical acceptance of this proposition has served the NCAA well over the years; it is no doubt the reason why such a classic cartel as NCAA's television plan has never been squarely challenged in the courts in the thirty years of the plan's existence. Moreover, it would appear that these same feelings heavily influenced the dissenting judge on the Court of Appeals.

This social argument fails, however, for essentially the same reason that the antitrust defenses of the NCAA fail. The "good works" of the NCAA not only are not dependent

upon, but bear no relation whatever to the anticompetitive features of the television plan. As the district court emphasized, though the supporters of the NCAA sincerely seemed to believe there was such a connection, no witness could supply any credible reason why the effectiveness of the NCAA required it to be the exclusive marketer of television rights for college football (D.C., 96a).[11] Nor has the NCAA argued to the contrary in this Court.

The courts may eventually be faced with cases involving close questions of the permissible degree of cooperation among sports competitors, which this Court may find necessary to review. This is not such a case.

Upon respondents' more complete statement of the case, it is clear that a grant of the writ of certiorari would serve no useful purpose. NCAA has petitioned for review of a hypothetical case, in two respects. First, NCAA wrongly tenders only a few of the deluge of the lower courts' holdings condemning NCAA's restraints under the antitrust laws as the determinative bases of the courts' decisions. Second, NCAA's first two questions presented are quite obviously hypothetical, since their object is to obtain a rule of reason analysis of NCAA's television controls, an analysis which NCAA has already received by both lower courts to no avail.[12] The Tenth Circuit accorded NCAA a rule of reason

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[11] The district court found significant the fact that television rights for other college sports were effectively marketed without NCAA acting as the exclusive seller (D.C., 47a-48a, 76a).

[12] Upon this basis the Solicitor General argued, in opposing NCAA's Application for Stay in this Court: "Since the court of appeals' per se characterization of the challenged conduct was not outcome-determinative, we cannot anticipate that four members of this Court would vote to grant certiorari on the first two questions presented in the application for a stay" (App., 3A). NCAA argues (Petition, n.12) that its Question 2, concerning allocation of burdens, affects the lower courts' findings under the rule of reason. This is flatly incorrect. The district court did not place the burden of proof in the rule of reason analysis on the defendant. More-

analysis in the interest of promoting litigation efficiency, given the prospect of review by this Court.[13]

The alternative holdings of the district court (either not considered or rejected by the Tenth Circuit) condemning NCAA's television controls also give sufficient cause to deny NCAA's petition for certiorari.[14] Should certiorari be granted petitioners will still fail on the merits in this Court if the Court upholds either of the bases on which the district court found a group boycott (Statement, ¶11), as respondents will urge the Court to do.

Moreover, the district court held that NCAA had illegally monopolized the market of college football television, noting that "NCAA makes no attempt to deny that if college football television is a relevant market, it is a monopolist" (D.C., 124a-125a). The Tenth Circuit found it unnecessary to reach this question (10th, 20a n.16).[15] How-

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[12] (Continued)

over, the Tenth Circuit's comment on burden of proof (10th, 11a) is clearly restricted to the *per se* evaluation of NCAA's television controls. NCAA also suggests that the difference between *per se* and rule of reason liability potentially affects the scope of relief. NCAA cites no authority, and the district court's opinion shows that relief was not predicated upon any such basis (D.C., 128a-133a).

[13] NCAA represents this explanation as a statement by the Tenth Circuit that it believed review by this Court was likely (Petition at 6). This does not seem to respondents to be consistent with either the court's express concern for litigation efficiency, or a denial of NCAA's motion for stay pending its petition for certiorari.

[14] It is well settled that "the prevailing party may defend the judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[15] The Circuit Justice, evidently misled by NCAA's assertion that the Tenth Circuit "put the monopolization holding to one side" (Application for Stay, p. 5), erroneously stated the Tenth Circuit had disagreed with the district court's monopolization holding (NCAA Appendix E, 142a).

ever, the district court's monopolization holding is clearly correct if it properly defined the market, and the Tenth Circuit upheld the district court's market definition (10th, 18a). NCAA has "an almost insurmountable burden" in overturning the findings upon which the market definition was made. *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959).

NCAA commences its argument (Petition at 8) with the observation that the invalidation of its television controls involves much of the television industry, a great number of universities, a significant amount of money, and billions of viewers. This is all true. As to the latter, the district court stated: "Perhaps its most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a).

But all of this counsels for denial of certiorari, so that all of the devastating consequences of NCAA's restraints may be expunged from the free market as soon as possible with the termination of the stay of the relief granted in this case. Each lower court decided, after careful consideration of the record in a full decision on the merits, not only to condemn the plan on multiple theories, but to refuse a stay. The NCAA has nevertheless now enjoyed two full years of its illegal plan since the district court judgment, leaving no practical recourse to respondents or the public. A grant of certiorari could add a third year of delay, even if affirmance is inevitable. The decisions below break no new legal ground. This case is important only because it eliminates such egregious restraints of free market forces, not because of the legal tenets by which this ablation was accomplished.

NCAA's argument that its "Television Plan and Contracts aid the NCAA and its members in competing against

other purveyors of entertainment" (Petition at 12) is foreclosed by, *inter alia*, this Court's holding in *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610-11 (1972), where Topco urged the division of markets between small grocery chains was justified to promote competition with large grocery chains. The Court answered: "Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Id.* This also dispenses with NCAA's argument that promoting live gate attendance justifies rendering the television football market unresponsive to viewer preference.[16]

Question 1: Both lower courts found the NCAA Football Television Plan to be a horizontal combination of all the country's major football playing teams with the purpose and effect, *inter alia*, of manipulating prices by limiting output (Statement, ¶3, ¶4). The plan has therefore twice been determined to be the purest, more universally condemned form of classic price fixing, long considered *per se illegal*. NCAA argues that it is nevertheless entitled to an automatic exemption from *per se* consideration based solely on the fact that it has other, lawful functions, and that it "advanced procompetitive justifications", which justifications it contends may not be scrutinized to determine their relationship, if any, to its price fixing activity.

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[16] NCAA argues (Petition at 14 n.9) that Congress has taken live gate attendance at football games into account as the basis for legislation. That is true. The culmination of these efforts is found at 15 U.S.C. §§ 1291-1295, a specific, legislative exemption from the antitrust laws for professional sports leagues in pooling their telecasting rights. Respondents do not deny that Congress could exempt NCAA from the antitrust laws; but it has not done so, as only it can. *See Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 354-55 (1982). This Court's "adherence to the *per se* rule is grounded" partially upon "a recognition of the respective roles of the judiciary and the Congress in regulating the economy." *Id.*

There is simply no support for such an automatic exemption.[17] Self-regulatory associations with lawful, even laudable, purposes and regulations have repeatedly been held subject to *per se* rules under the Sherman Act for far more subtle interference with price mechanisms, despite advancement of procompetitive justification. *E.g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978);[18] *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975).

The invocation of the phrase "joint venture" does not gain entitlement to such an exemption. Joint ventures, no less than other combinations of competitors, may be subject to *per se* analysis. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593, 597-98 (1957). But the arrangement here is not one "in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit", *Arizona* v. *Maricopa County Medical Society*, 457 U.S. at 356-57. It is simply a partial integration relating to marketing, and was properly analyzed by the Court of Appeals as such.

Broadcast Music, Inc. v. *CBS*, 441 U.S. 1 (1979), does not forbid *per se* analysis in joint marketing arrangements. In *Broadcast Music*, the Court held that the Court of Appeals erred in summarily condemning "literal" price fixing without considering whether the practice itself was plainly anticompetitive and "facially appear[ed] to be one which would always or almost always tend to restrict competition

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[17] Any argument that NCAA is entitled to escape *per se* scrutiny because courts have not had much experience with similar organizations is clearly contrary to this Court's decision in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 350-51 (1982); that the *per se* rule need not be rejustified for every industry that has not been subject to significant antitrust litigation.

[18] *Professional Engineers* is described as a *per se* price fixing case in *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

and decrease output . . ." 441 U.S. at 19-20. In *Broadcast Music*, there was no restriction of output, no artificial price enhancement and no restrictions on sales outside the contract — in short, no frontal assault on the free market system.[19]

The lower courts here found much more than "literal" price-fixing; they found free market forces destroyed, and price competition totally eliminated from the market (D.C., 63a-64a; 10th, 21a, 14a-15a). They held that NCAA has made itself the single seller in the market of college football television by eliminating all individual sellers (D.C., 74a; 10th, 13a-14a).[20] Both courts found the exclusivity with which NCAA controls its members' rights to injure the free market significantly (D.C., 93a, 103a; 10th, 12a, 13a-14a, 16a). Moreover, the district court found NCAA controls had the *purpose* of fixing prices and restricting output, and were therefore naked restraints (D.C., 100a, 112a, 115a). The Tenth Circuit similarly held: "The NCAA television arrangement is so fraught with anticompetitive potential that it 'appears to be one that would always or almost always tend to rstrict competition'" (10th, 9a, 15a).[21]

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[19] The Court found especially significant the fact that the individual composers had not agreed to fix prices for their individual licenses "or to use the blanket license to mask price-fixing in other markets." 441 U.S. at 23-24.

[20] The Justice Department argued, and the district court and Tenth Circuit held that NCAA had used its dominant position in regulating the intercollegiate athletic programs of its members to secure control over all of their football television broadcasting rights (App., 21B; D.C., 53a-54a, 111a-112a; 10th, 22a).

[21] NCAA also cites *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), where the court relies upon *Broadcast Music*. However, the court in *Northrop* was careful to note that the contractual arrangement involved in the case differed "significantly from the horizontal price-fixing arrangements the Supreme Court has uniformly subjected to per se condemnation." *Id.* at 1051 n.27. This statement also

NCAA says that the Justice Department agreed with its argument that application of the *per se* rule is precluded if the NCAA is a lawful joint venture. However, the methodology advocated by the Justice Department hardly supports NCAA's position here. The Justice Department argued that there was no need to balance the procompetitive and anticompetitive effects of NCAA's controls unless NCAA demonstrated "that the procompetitive effects of its joint venture efforts are dependent on the significantly anticompetitive provisions of its television rules . . . ." (App., 18B). The Justice Department also contended that NCAA had the burden of proving "that the restraints were needed in order to sustain its procompetitive activities" (App., 26B n.19). In fact, the Justice Department recognized in its briefing before the Court of Appeals that "the distinction

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[21] (Continued)

easily distinguishes the circuit cases cited by NCAA in its Note 8. None of these cases involve price fixing, and in most of them, the courts were careful to distinguish restraints that would be *per se* illegal. *E.g., Turf Paradise, Inc.* v. *Arizona Downs*, 670 F.2d 813, 821 (9th Cir. 1982), *cert. denied*, 456 U.S. 1011 (holding "date allocation provisions" for determining use of racetrack were not "horizontal restraints" and therefore not subject to *per se* analysis under Sherman Act); *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1258 (2d Cir. 1982), *cert. denied*, U.S. , 74 L.Ed.2d 639 (distinguishing agreements fixing prices or restricting customers to whom products will be sold); *Hennessey* v. *NCAA*, 564 F.2d 1136, 1149 n.14, 1150, 1152 (5th Cir. 1975) (noting that NCAA television contracts and ticket sales are a big business venture subjecting NCAA to the antitrust laws, but holding "this particular restraint [limiting coaching staffs] . . . is not a per se violation of the antitrust laws"). *Howard University* v. *NCAA*, 510 F.2d 213 (D.C. Cir. 1975), cited by NCAA, is not even an antitrust case. Other sports cases have embraced the *per se* rule under circumstances involving a self-regulatory association. *E.g., Blalock* v. *Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1264-65 (N.D. Ga. 1973); *Robertson* v. *NBA*, 389 F.Supp. 867, 893 (S.D. N.Y. 1975).

between our analysis and that of the district court is primarily terminological" (App., 15B, n.13).[22]

Moreover, the procompetitive justifications proffered by NCAA to avoid *per se* analysis, promotion of gate attendance and athletic competitive balance, were specifically and emphatically rejected in the lower courts' factual findings, *infra* at 29.

Finally, even if NCAA were correct in its contention that the *per se* rule was improperly applied, this would clearly not warrant review, since NCAA has already obtained everything it seeks here — a rule of reason anaylsis.

Question 2: NCAA urges two points here, which will be dealt with separately. First, it argues that once an antitrust defendant asserts that otherwise *per se* unlawful restraints are ancillary to some other legitimate purpose, that defendant *eo ipso* becomes entitled to a full-scale rule of reason inquiry, without any requirement that the restraints be shown to be reasonably necessary to the legitimate purpose they are asserted to be ancillary to.

The ancillary restraints doctrine has its origin in the decision in *Addyston Pipe & Steel Co.*, 85 Fed. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Both lower courts cited *Addyston* in discussing the doctrine that some price restraints, ancillary to other legitimate ecomonic activity of

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[22] NCAA urges that the Solicitor General has adopted its approach "to substance over form in antitrust" in amicus briefs filed in this Court in three cases cited by NCAA in its note 7. None of these cases involves a horizontal price fixing agreement, and all concern restraints involving difficult questions of antitrust law. (*E.g.*, tying arrangement purported to improve hospital services, resale price maintenance, and intra-enterprise conspiracy doctrine). The Solicitor General, in opposing NCAA's Application for Stay in this Court, said it did not believe this case worthy of review, and noted that this Court has more felicitous opportunities to clarify the proper application of *per se* rules, citing two of the three cases NCAA cites (App., 3A n.1).

the defendant, may escape *per se* antitrust condemnation (10th, 9a; D.C., 95a). As both lower courts observed, however, one indubitable requirement of the doctrine is that a restraint must be "reasonably necessary" to the purpose by reference to which the restraint is sought to be legitimized. *Addyston*, *supra*, 85 Fed. at 282-83. The only authority NCAA cites in support of discarding this method of analysis is *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). But *Broadcast Music* represents what is probably the strongest single obstacle for NCAA in its contention.

In carving out a limited exception from the *per se* rule for the nonexclusive cooperative marketing of blanket licenses for musical compositions, the Court in *Broadcast Music* found that "[a] middleman with a blanket license was an *obvious necessity* if the thousands of individual negotiations, a virtual impossibility, were to be avoided." (Emphasis supplied) 441 U.S. at 20. The Court said, in discussing the relationship between the Sherman Act and the Copyright Act:

> "[W]e would not expect that any market arrangements *reasonably necessary* to effectuate the rights that are granted [under the Copyright Act] would be deemed a per se violation of the Sherman Act." (Emphasis supplied) 441 U.S. at 19.

The Court concluded its analysis of the relationship between the blanket license and the market efficiencies it promoted this way:

> "Moreover, a bulk license of some type is a *necessary consequence* of the integration *necessary* to achieve these efficiencies, and a *necessary consequence* of an aggregate license is that its price must be established." (Emphasis supplied) 441 U.S. at 21.[23]

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[23] In *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 356 n.33, the Court rejected an attempted comparison to *Broadcast Music*, observing that price setting of the doctors was not a "necessary conse-

It is surely sensible to permit otherwise *per se* illegal behavior, as ancillary to other objectives, only where it is needed to fulfill those objectives. The *per se* rule cannot be avoided by showing that if a rule of reason analysis were used, the restraint would not be held unlawful. Besides being a nonsequitur, such a principle would conflict with the well established principle for applying the *per se* rule, recently reaffirmed in *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 351 (1982), that: "The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

Second, NCAA argues that the burden of proof was improperly placed upon it. NCAA's assertion that the burden

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[23] (Continued)

quence" of prepaid health insurance plans. The Solicitor General had argued (amicus curiae brief at 20) that once it is shown defendants have fixed prices, the assessment of any justification for doing so "should be limited to ascertaining whether the proponents of the agreements have identified significant procompetitive effects achieved through integration of productive capacity that are unattainable in the absence of the agreement. . . . In the absence of such a necessary relationship to integrated productive activity, however, an agreement among competitors fixing prices properly is deemed a naked restraint with no purpose other than elimination of rivalry." Courts have applied similar methodology in sports boycott cases, often applying the *per se* rule. *See Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1064-65 (D.Cal. 1971), injunction reinstated sub nom., *Haywood* v. *NBA*, 401 U.S. 1204 (1971); *Linseman* v. *World Hockey Ass'n*, 439 F.Supp. 1315, 1321 (D. Conn. 1977); *Brenner* v. *World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982), *cert. denied*, U.S. , 74 L.Ed.2d 76; *Cf., Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n*, 511 F.Supp. 1103, 1116 (D. Neb. 1981), *aff'd*, 665 F.2d 222 (9th Cir. 1981). *See also* Sullivan, ANTITRUST §77, pp. 208-209 (1977) (applying two part test to avoid *per se* rule: (a) Price restraint must arise inevitably from the integration; (b) Arrangement must not dampen price competition market-wide by ending price competition between participants).

of proof "never shift[s] to the defendant" in an antitrust case (Petition at 16) is confusing at best, and inaccurate at worst. Many affirmative defenses exist in antitrust law where defendant has the burden of proof. *See, e.g.*, 10 Von Kalinowski, *Antitrust Laws and Trade Regulations*, §109.01 *et seq.* Unquestionably, entitlement to relief from *per se* scrutiny for restraints which ordinarily fall within *per se* rules is a defense, and the authorities accordingly place the burden of proof on the antitrust defendant seeking such relief.[24] In *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 693 (1978), this Court described defendant's argument that its procompetitive justification should relieve it from *per se* scrutiny as an "affirmative defense".

Contrary to NCAA's assertion (Petition at 15, n.10), the burden of proof question does not affect all of the findings of the trial court. The Tenth Circuit said the burden of proving the effectiveness and necessity of NCAA's restraints was on the NCAA "when considering whether to apply *per se* or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration" (10th, 11a n.9).

The burden of proof issue, even if erroneously decided, would hardly seem to merit review in this case. The burden of proof is also often denominated the "risk of non-persuasion", and is important only where a court is in doubt, being unable to decide whether a factual proposition is true or false. *E.g.*, McCormick, *Evidence* §336, p. 784 (1972); 9 Wigmore, *Evidence* §2485, pp. 285-87 (1981). It cannot realistically be said that either court below re-

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[24] The courts in the sports cases cited in note 23, *supra*, required defendant to prove entitlement to exception relief from otherwise applicable *per se* rules. The Justice Department as amicus curiae in the court below also contended the burden of proof was on NCAA to show its restraints were necessary to sustain its procompetitive effects (App., 26B n.19).

served any doubt as to their factual conclusions. To the contrary, both courts vigorously and affirmatively repudiated NCAA's contentions as palpably false.[25]

NCAA also asserts (Petition at 15, n.10) that on some issues the only evidence was that produced by NCAA, without identifying any such issues so that it can be seen whether they have legal significance. In any event, a party's burden of proof may be satisfied by evidence introduced by its adversary.[26] Notably, the district court reached many of its findings based upon testimony of NCAA witnesses (*E.g.*, D.C., 57a, 73a, 75a, 90a-91a, 120a-121a).

Question 3: Sustaining of the lower courts' market power finding will be fatal to the NCAA not only on the rule of reason inquiry under §1 of the Sherman Act, but also on the district court's monopolization finding under §2. The NCAA has conceded that its *only* defense to §2 is that the relevant market was defined improperly (D.C., 124a-125a; 10th, 20a n.16). The Tenth Circuit held the district court's definition of the relevant market "has adequate

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[25] The district court made numerous affirmative findings of fact, showing that it was not in any doubt whatsoever in reaching its conclusions. For example, it affirmatively found that NCAA's controls were not intended to protect gate attendance (D.C., 69a-70a), that NCAA's non-commercial regulations were sufficient for furthering athletic competitive balance (D.C., 70a, 110a), that the controls are much more far reaching than necessary to achieve competitive balance, and that any contribution to competitive balance "is overwhelmed by the violence which the controls inflict on the free market economy" (DC., 109a). Moreover, the court concluded affirmatively that the *purpose* of NCAA's controls is to enhance prices by fixing them and restricting output (D.C., 112a). Similarly, the Tenth Circuit affirmatively held: "The restraints contained in the television plan do not increase the efficiency of the rule making integration and are broader than necessary to achieve asserted procompetitive goals" (10th, 11a).

[26] *E.g.*, *Van Sant* v. *American Express Co.*, 169 F.2d 355, 365 (3d Cir. 1947); *Louis Dreyfus Corp.* v. *United States*, 401 F.Supp. 919 (S.D.N.Y. 1975).

evidentiary support in the record" (10th, 18a). To obtain a reversal in this Court, the NCAA faces the "almost insurmountable burden" of upsetting these findings. *International Boxing Club* v. *United States*, 358 U.S. 242, 252 (1959).

Both lower courts devoted considerable attention to and made extensive findings in defining the relevant market (Statement, ¶15). NCAA has again ignored these findings. NCAA says (Petition at 19) that the lower courts based their definition of the relevant market "essentially" on the grounds that (1) for many *viewers*, there is no substitute for college football and (2) advertisers pay more per viewer of college football television than they pay for average television viewers. This is fundamentally incorrect. The courts properly analyzed the market from the standpoint of the *networks*, the purchasers of broadcast rights. The courts found that for the networks, there is no substitute for college football, that they need college football to offer on Saturday afternoon, that CBS frequently "went dark" opposite ABC on Saturday afternoons when ABC had exclusive rights to televise college football, and that ABC was even willing to suffer a net loss to televise college football for the intangible benefits it received from being affiliated with the sport (Statement, ¶15). Yet NCAA claims that it challenges only "the principles used by the lower courts, not the facts they found" (Petition at 20-21, n.14).[27]

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[27] NCAA, holding out its distilled version of the courts' holdings as dispositive, asserts (Petition at 20-21, n.14) that it does not deny that many viewers find college football unique or that networks "feel compelled to show college games." NCAA says, however, that "[t]he question is wholly legal: what inferences should be drawn from the undisputed facts?" The "clearly erroneous" standard of review, Rule 52(a), Fed.R.Civ.P., cannot be circumvented so easily. NCAA's assertion that the parties are in agreement on the facts is correct only in the sense that the parties did not attack each other's raw statistical data. Even in this respect the experts drew widely divergent conclusions from the data. As

The district court carefully analyzed the unique or special characteristics of the industry, the buyers, the sellers, and the product itself (D.C., 71a-75a). Both lower courts also fully analyzed substitutability and cross-elasticity of demand (D.C., 122a-123a, 76a-77a; 10th, 18a-19a), as had the parties' experts. And both courts concluded that by every test the NCAA has market power.

The NCAA asserts that if a court can assess directly whether defendant can affect price by reducing output, this is "so much the better" to determine market power (Petition at 21). The NCAA then proceeds to theorize that it has no such power. However, the district court made explicit and extensive findings on this precise issue, analyzing NCAA's output and price, and concluding that market power was directly demonstrated (D.C., 121a-124a). And it was this type of analysis that led the Court of Appeals to conclude that the NCAA possessed market power even if the district court had defined the market too narrowly (10th, 20a). These findings would surely present an insurmountable burden to NCAA on review by this Court.

The district court also held: "It strains credulity to suggest that broadcast programming does not consist of submarkets, and the Court finds that the evidence does not yield that result." (D.C., 76a). The court's analysis accords with this Court's decision in *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).[28] The decision in *Brown*

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[27] (Continued)

the district court said, "[t]he issue of relevant market was hotly contested at trial." (D.C., 116a). But in any event, the inference to be drawn from "the undisputed facts" is clearly factual itself. The "clearly erroneous" standard therefore applies. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982); *United States* v. *United States Gypsum Company*, 333 U.S. 364, 394 (1948).

[28] NCAA argues that the methodology used by the lower courts creates a conflict between the circuits, citing a number of cases for the proposition that the existence of some committed customers and distinctive prod-

Shoe was merely an extension of this Court's previous decision, more significant in the context of this case, in *International Boxing Club* v. *United States*, 358 U.S. 242 (1959). In *International Boxing*, this Court affirmed a trial court judgment that there was a relevant market "in the promotion, broadcasting, and televising of professional world championship boxing contests", *id.* at 244, because it was "the 'cream' of the boxing business." *Id.* at 252. One factor considered was the comparison of revenue received for championship, vis-a-vis nonchampionship boxing contests, *id.* at 250. The Court, noting that "appellants have an almost insurmountable burden" in overturning the findings of the district court, *id.* at 252, concluded that those findings were not "clearly erroneous" in defining the relevant market. *Id.* at 251.

Question 4: As to the rule of reason inquiry, NCAA again has distorted and trivialized the lower courts' holdings. The NCAA suggests that the Court of Appeals' holding on the rule of reason is based solely upon NCAA's elimination of game by game negotiation for broadcast rights.

Though this was one element of consideration before both lower courts, the courts fully considered the character of the contracts and surrounding circumstances to conclude that the NCAA plan was unlawful (Statement, ¶¶ 3, 4,

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[28] (Continued)

ucts do not identify a market. All of the cases NCAA cites recognize the legitimacy of defining a market according to the uniqueness of a product. Indeed, in all but *Reiner* v. *General Motors Corp.*, 511 F.Supp. 1167 (S.D.N.Y. 1981), *aff'd*, 671 F.2d 91 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 112, this Court's decision in *Brown Shoe*, *supra*, was specifically considered for its submarket principles. Submarket principles have been steadfastly adhered to by the courts of appeals, in sports as well as other cases. *E.g.*, *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1260 (2d Cir. 1982), *cert. denied*, ___ U.S. ___, 74 L.Ed.2d 400; *Twin City SportsService, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1299-1300 (9th Cir. 1982). No conflict exists between the circuits on this issue.

13 and 14). Central to this holding was the finding that NCAA, in becoming the exclusive seller of college football television rights through its single package, had "used its dominance in the regulation of intercollegiate athletics to obtain control of broadcast rights to intercollegiate football" (10th, 22a). The NCAA ignores this finding in extolling the level of competition for purchase of its package.

But this finding alone is sufficient to condemn the plan. As both courts observed, NCAA never proffered any justification for its exclusive control over the television rights. The Justice Department urged as *amicus curiae* to the Tenth Circuit: "In particular we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges. . . ." (App., 23B-24B n.17).[29]

The lower courts listed numerous other anticompetitive effects on the free market that were, in the courts' view, beyond justification by the NCAA's claimed benefits from its restraints (Statement, ¶¶ 13, 14). The Justice Department also listed the numerous adverse effects of NCAA's television controls on the free market (App., 19B-20B.)[30]

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[29] This is also the explanation for why "ABC appeared as amicus curiae to defend the contracts, while CBS and Turner supported the NCAA's request for a stay in the Tenth Circuit" (Petition at 23). ABC, CBS and Turner are happy to have exclusive rights, under the present contracts, to televise college football. On the other hand, the Association of Independent Television Stations, Inc., representing 84 television broadcast stations unaffiliated with any network, filed an amicus brief in the Tenth Circuit supporting the district court on the ground, *inter alia*, that the NCAA television plan "restricts output by foreclosing in most instances the purchase by other broadcasters of rights to televise a game not chosen by ABC or CBS, even if all schools involved are willing to have that game broadcast." (pp. 10-11).

[30] One of the points made by the Justice Department is that the NCAA controls "artificially suppressed product diversity, by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and by limiting the number of appearances on television by in-

Moreover, each of the NCAA's proffered procompetitive benefits was rejected in specific findings of fact by the lower courts (Statement, ¶¶ 5-10). The NCAA has disregarded these findings. For example, NCAA says that its single most important procompetitive justification is that "[t]he [NCAA] plan and contracts spread national and regional TV appearances among more teams than would be the case in their absence" (Petition at 14). The district court found that although fewer different teams would appear on the networks, "more games involving more teams would be telecast by local and regional stations" (D.C., 114a) and the total number of college football games televised would increase (D.C., 66a, 118a). The Tenth Circuit relied upon these findings in concluding that the *elimination* of NCAA's television plan "would have the effect of equalizing revenues" (10th, 21a). Both lower courts also found NCAA's gate attendance argument unsupported by the evidence (D.C., 107a-109a; 10th, 10a). And the NCAA's interbrand intrabrand argument is negated by the market findings of the lower courts, as the Tenth Circuit properly observed (10th, 21a-22a).

Finally, the NCAA cannot challenge the findings of the lower courts which demonstrate beyond argument that the role of the antitrust laws as a "consumer welfare prescription"[31] can only be served by dismantling the television controls. More games will be shown in a free market; particularly more game viewers wish to see, and fewer they do not. NCAA witnesses not only admitted this, but stated it as their primary objection to the free market. Too many

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[30] (Continued)

dividual members. According to testimony these restrictions have reduced the opportunity for many smaller schools to appear on television (either locally or regionally), . . . and have reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as they would otherwise be able" (App., 20B).

[31] *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).

games would be shown, they complained, driving down the price the schools could command for their network contracts. "Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a). A better argument for prompt institution of the free market cannot be imagined.[32]

CONCLUSION

The NCAA has presented a hypothetical case, on hypothetical facts with questions presented which, even if decided as NCAA urges, would not change the result. Even the hypothetical case would not be deserving of review. The actual case certainly is not. The writ of certiorari should be denied.

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[32] The cases cited by NCAA in its attempt to create a conflict between the Circuits on the rule of reason holding (Petition at 22-23 n.16) are entirely inapposite to this case. Their substantial holdings follow parenthetically. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (approving long-term contract for sale of coal by single coal producer to single electric utility); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (prohibiting merger of two independent viable gas producers because "[t]he presence of two or more suppliers gives buyers a choice." *Id.* at 661); *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974) (permitting merger between coal producers, where one had exiguous reserves and would not be able to effectively compete for long-term contracts between single producers and purchasers); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (holding lawful labor union's renegotiation of major league baseball players' individual contracts for sale of publicity rights for baseball cards — exclusively only when used in combination with bubble gum — not when combined with nonconfectionary goods); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982) (opining that city's elected representatives could grant exclusive franchise to cable company which is natural monopolist anyway; distinguishing as unlawful case where competing cable companies agree not to invade each other's territory. *Id.* at 127).

Respectfully submitted,

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September, 1983

APPENDICES

APPENDIX A

No. A-24

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, APPLICANT

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, ET AL.

ON APPLICATION FOR A STAY OF THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND FOR A STAY OF THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE CONCERNING THE APPLICATION FOR STAY

This memorandum is submitted in response to Justice White's invitation to the Solicitor General to express the views of the United States concerning the application for a stay. The views of the United States on the merits of this case are set out in detail in an *amicus curiae* brief filed in the court of appeals, a copy of which is attached hereto. In this memorandum we will address only the issues relevant to the stay application.

1. This case concerns the legality, under the antitrust laws, of a plan adopted by applicant National Collegiate Athletic Association ("NCAA"). That plan has the prac-

tical effect of reserving to the NCAA the exclusive authority to sell television rights for college football games played by its member schools. Respondents the University of Oklahoma and the University of Georgia, two members of the NCAA, claim that the NCAA's football television plan unreasonably denies individual member schools the opportunity to sell the television rights to their football games, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 & 2; respondents have sought injunctive relief against further implementation of the NCAA's plan. After a bench trial, the district court concluded that the plan did in fact violate Sections 1 and 2 of the Sherman Act and awarded respondents injunctive relief. The court of appeals agreed that the plan violated Section 1, did not reach the question of whether it violated Section 2, and remanded the case to the district court to reconsider the scope of its injunction in light of the views expressed in the court of appeals' opinion. After the court of appeals denied a motion to stay its mandate, the NCAA applied to this Court for a stay pending the filing of a petition for certiorari.

2. A stay of the mandate of a lower court will be granted only on an "extraordinary showing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163-164 (1923). At the very least, the applicant must show both that there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari," *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, Circuit Justice), and that there is a "likelihood that irreparable harm will result if th[e] decision [below] is not stayed." *Times-Picayune Publishing Co.* v. *Schalingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, Circuit Justice). See *Whalen* v. *Roe*, 423 U.S. 1313, 1316 (1975) (Marshall, Circuit Justice). For the reasons indicated below, the United States is of the view that it is not probable that certiorari will be granted. The United States, however, is not in a position to evaluate the equitable balance between the parties with respect to any stay, nor qualified to speculate on whether

or how the district court will narrow its injunction, or the manner in which the parties might be affected by any such modification. Consequently, the United States takes no position on those aspects of the stay application.

3. The first two issues that the NCAA proposes to present for review on certiorari (Application at 2, 13-18) arise from the court of appeals' holding that the NCAA's television plan is a per se violation of Section 1. However, while the court explicitly ruled that "the television plan constitutes *per se* illegal price fixing" (Appendix A at 15a), it reached that conclusion only after a lengthy analysis of the alleged justifications for the plan (*id.* at 6a-15a) and then went on to hold, in the alternative, that the NCAA's plan violated Section 1 even when evaluated under the rule of reason (*id.* at 15a-22a). In its *amicus* brief in the court of appeals, the United States asserted that the challenged conduct should not be deemed per se unlawful (pp. 12-20). We believe that it is a contradiction in terms to do what the court of appeals did here — to designate conduct as "per se" illegal only after a lengthy judicial inquiry into its potential competitive detriments and benefits; in our opinion, such an improper analysis can lead to incorrect results. See, *e.g.*, *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 19-20 n.33 (1979). Nevertheless, any error in the court of appeals' "per se" characterization was rendered moot by the fact that the court proceeded to analyze the challenged conduct under the rule of reason and rendered an alternative holding that, in our view, correctly concluded that the NCAA's conduct violated the Sherman Act. Since the court of appeals' per se characterization of the challenged conduct was not outcome-determinative, we cannot anticipate that four Members of this Court would vote to grant certiorari on the first two questions presented in the application for a stay.[1]

[1] Although the United States believes that the proper use of per se analysis is extremely important to antitrust enforcement, this Court has other opportunities to clarify the law in that respect. *See, e.g., Monsanto Co.* v.

The third issue presented by the NCAA — whether the court of appeals too narrowly defined the relevant product market (Application 2, 18-20) — does not merit plenary consideration by this Court. The court of appeals' relevant product market finding, even if erroneous, is fact-laden, creates no conflict in the circuits, and possesses little precedential significance. Even if the court of appeals' conclusion that NCAA football is "a unique type of Saturday afternoon programming" that constitutes a relevant product market in which the NCAA has market power (Appendix A at 18a-20a) is unfounded, any such error would not mean that its ultimate rule of reason conclusion was incorrect. As we indicated to the court of appeals in our *amicus* brief (pages 28-30), the United States believes that the court should have focused on the NCAA's regulatory power over colleges that want to participate in a full program of intercollegiate athletics, rather than on its power over television advertisers. The NCAA possesses very substantial regulatory power over those intercollegiate events, including football, in which its members take part. In these circumstances, the lower courts correctly determined that it utilized that power to deprive respondents of their ability to sell — and other purchasers of the ability to buy — college football television programs other than the package sold by the NCAA. And, in our view, although many of the justifications offered by the NCAA merited careful consideration by the court, on balance the NCAA failed to justify the restrictions that it has placed on the ability of its member schools to arrange for the telecast of their own football games.

The fourth issue presented by the NCAA — whether college sports television packages arranged by groups of

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[1] (Continued)

Spray-Rite Service Corp., No. 82-914, *cert. granted*, February 28, 1983; and *Jefferson Parish Hospital* v. *Hyde*, No. 82-1031, *cert. granted*, March 7, 1983.

schools are necessarily unlawful (Application 2, 20-22) — is not presented by this case. Contrary to applicant's assertion (*id.* at 20-22), the court of appeals' opinion did not broadly prohibit all joint sales of program packages; rather, the decision focussed solely upon the NCAA's nationwide plan that prohibits individual program sales by its members. The circumstances under which particular television packages of lesser scope or exclusivity may be subject to antitrust scrutiny are not implicated by this decision.

In summary, the United States is not in a position to determine the relative harm or the balance of equities between the parties with respect to a stay. We state only our view that it is not probable that certiorari will be granted to review the issues the NCAA proposes to present. While the United States disagrees with some aspects of the opinion of the court of appeals, we believe its judgment was correct, and we are cognizant that this Court traditionally exercises its certiorari jurisdiction to review judgments rather than to revise opinions.

Respectfully submitted,

REX E. LEE
Solicitor General

JULY 1983

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 82-2148

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE

[Table of Contents and Authorities omitted here]

INTEREST OF THE UNITED STATES

The United States has primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws. Consequently, it has a substantial interest in ensuring that those laws are interpreted and applied in a manner that promotes competition and consumer welfare.

STATEMENT OF ISSUES

The United States will address the following issues in this *amicus* brief: [1]

[1] The United States will not address the question whether the NCAA violated section 2 of the Sherman Act, 15 U.S.C. 2, as the district court found.

1. Whether the restrictions imposed by the National Collegiate Athletic Association ("NCAA") on its members with respect to the telecasting of football games and the television contracts entered into by the NCAA pursuant to its restrictive television policies constitute the type of price fixing or group boycott activities which have been characterized by the courts as per se violations of section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether the evidence supports the district court's conclusion that the NCAA's television policy, which has the practical effect of arrogating to it the exclusive right to sell television rights to member football games and thereby depriving member colleges of the right to compete in the sale of television rights, constitutes an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. 1, when judged under the rule of reason.

STATEMENT OF THE CASE

I. *PROCEEDINGS BELOW*

The University of Oklahoma and the University of Georgia, plaintiffs in this action, brought suit in the United States District Court for the Western District of Oklahoma against the NCAA, alleging that the latter's football television contract negotiated with the television networks,[2] and the restrictions imposed by the NCAA on the authority of its members to seek independent telecasting of their games, violated sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[3] After trial to the bench in June 1982, the dis-

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[2] From 1965 to 1981, ABC was the only network to obtain broadcasting rights for college football television. New contracts negotiated for 1982 through 1985 grant CBS as well as ABC the right to broadcast college games. In addition, Turner Broadcasting System, which promotes a cable network, contracted to telecast college games. Together these three entities will be referred to herein as "the networks."

[3] Section 1 of the Sherman Act provides: "Every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several

trict court (Hon. Juan G. Burciaga of the District of New Mexico, sitting by designation) ruled for the plaintiffs in an opinion and judgment rendered on September 15, 1982. The court held that the controls exercised by the NCAA constituted both an agreement among competitors to fix prices and restrict output and a group boycott, which were illegal per se under section 1 of the Sherman Act. Alternatively, it reviewed the NCAA's conduct under the rule of reason and determined that it violated the antitrust laws under that test. Finally, the court held that the NCAA monopolized the market for college football television in violation of section 2. The court therefore voided the television contracts between the NCAA and the networks and enjoined the NCAA from prohibiting its members from negotiating contracts for the telecasting of games in which they participate. The NCAA then appealed to this Court, which granted a stay of the district court's mandate pending appeal.

II. *STATEMENT OF FACTS*

Defendant NCAA is a private non-profit association, whose membership consists of approximately nine hundred colleges and universities,[4] which was established in 1905 for the purpose of regulating the conduct of intercollegiate athletic contests. The NCAA regulates a number of aspects of college sports, with the express purposes of organizing the play, protecting the amateur status of col-

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[3] (Continued)

States, or with foreign nations, is declared to be illegal." Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

[4] Members of the NCAA are placed in one of three divisions depending upon the size of their athletic programs. Of its members, approximately five hundred field football teams, and 187 of the football schools are in Division I.

lege athletics, and avoiding what it viewed as excesses that were inconsistent with its concept of athletics performed by "scholar-athletes." Over the years the NCAA enacted numerous rules — such as playing rules, restrictions on the number of scholarships and on the financial recruitment incentives schools may award, limitations on coaching staffs and training seasons, and standards for academic eligibility — that were directly related to the attainment of these objectives.

In the early 1950s, the NCAA expanded its original role of establishing rules for playing football and enacted a series of stringent restrictions on the telecasting of college football games. This expansion of its regulatory role was a response to the concern expressed by some members that the increase of uncontrolled telecasting would reduce public attendance at live games. Thus the NCAA began regulating the marketing aspects of college sports that were at best indirectly related to the world of "scholar athletes" and instead had a direct impact upon the financial relationship of schools with the media and, through them, with consumers and advertisers.[5]

The NCAA, by its television restrictions, as a practical matter has arrogated to itself the exclusive authority to sell television rights for college football games, and has prohibited individual schools from negotiating with television or cable outlets other than those chosen by the NCAA and the

[5] Until 1977, the NCAA implemented these restrictions through a Plan that was developed by its Football Television Committee in response to questionnaires completed by the membership. After 1977, the membership, rather than approving a fixed plan, voted on Principles of Negotiation, which provided a general, though not binding, basis for negotiation between the NCAA and the television networks. Until recently, the NCAA negotiated annual contracts with a single network. In 1977, however, it entered into a four-year contract with a single network (ABC), and in 1981 it entered into four-year contracts with two networks and a cable telecasting system.

contracting network.[6] In addition, the controls limit the number of times specific teams may appear on television, and they set a minimum number of games and a minimum number of regional and nationwide broadcasts the networks must present during a season. Finally, they require the networks to present a fixed minimum number of different teams during the course of a season. Dist. ct. op. at 24.[7]

The prohibitions against independent negotiations by any member or group of members of the NCAA are reinforced by the threatened use of various sanctions by that organization. A violator may be prohibited from appearing on television in a football contest with any other NCAA member, which, the district court found, effectively eliminates the possibility of appearing on television at all. Dist. ct. op. at 28-29, 63-65. A violator also may be banned from appearing in NCAA-sponsored events and playoffs in other sports and ultimately be expelled from the organization. Tr. 15-16, 54, 115. Because of the NCAA's dominant regulatory position in the world of college sports, such sanctions would devastate a school's athletic programs, make it impossible to recruit quality athletes, and reduce the in-

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[6] "Exception telecasts" for individual games are permitted under rigidly limited conditions. See *Board of Regents* v. *NCAA*, slip op. at 6, 19 (Civ. No. 81-1209-BU) (W.D. Okla. 1982) [hereinafter cited as "Dist ct. op."]. Very few games each year actually are telecast under this exception.

[7] In return for the exclusive right to broadcast college football games, the networks agree to pay an annual "minimum aggregate fee," which has ranged from $29 million in 1978 to a planned $72 million in 1985. Dist. ct. op. at 18-18a. A small portion of the fee is earmarked for the broadcast of playoff games and Division II and III telecasts, and the NCAA itself retains eight per cent of the remainder. The remaining amount is divided among the Division I teams that appear on television during the year. The sum paid to each team is "recommended" by the NCAA, and the NCAA's practice has been to recommend that all nationally-televised teams receive equal amounts, and similarly that participants in all regionally-televised games be paid the same amount. The NCAA's recommendations have been uniformly adopted by the networks.

come and prestige resulting from participation in intercollegiate athletic events. Dist. ct. op. at 14.

In the 1970s, discontent with the NCAA football regulations caused many of the major football colleges, including plaintiffs, to form the College Football Association ("CFA"), to lobby and promote their interests within the NCAA. The CFA then developed an independent television plan and negotiated a contract with the NBC network. In response, the NCAA interpreted its by-laws to prohibit such independent actions and threatened sanctions against the CFA members. Dist. ct. op. at 8-12. The CFA then applied to the district court for a temporary injunction, which was granted and continues in effect, prohibiting the NCAA from attempting to interfere with the former's negotiations with NBC. Nonetheless, the CFA's attempts to develop an independent television contract failed, in large part, the district court found, because of "the threat of NCAA sanctions, in spite of the temporary equitable relief." *Id.* at 12. Members of the CFA continued to work within the NCAA by presenting resolutions at the NCAA's conventions calling for the easing of the television restrictions. But, although some restructuring of the football divisions was accepted, the full membership defeated proposals to reduce the organization's control over television.[8] And in January 1982 the NCAA amended its by-laws to state explicitly that it "shall control all forms of televising of the intercollegiate football games of member institutions . . . ." *Id.* at 9-10, 13-14. Plaintiffs then brought this suit.

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[8] A substantial majority of the NCAA's membership consists of schools with no football program or with small programs appropriate for Divisions II and III. Thus, the interests of the major football schools (*i.e.*, those in Division I-A and the CFA), when at odds with those of the remainder of the NCAA membership, as in this case, can be easily and consistently defeated when considered within the confines of the NCAA. *Cf.* Dist. Ct. op. 12-13.

SUMMARY OF ARGUMENT

The United States submits that the district court correctly determined that the NCAA's restrictive television policies violated Section 1 of the Sherman Act, and that the injunctive relief ordered was an appropriate remedy of the violation.

We believe, however, that the district court erred in concluding that the challenged conduct constitutes either price fixing or a group boycott that is per se unlawful under Section 1 of the Sherman Act. Conduct is deemed per se unlawful under the Sherman Act only where judicial experience indicates that the practices are of a type so likely to restrain competition that inquiry into the likely competitive effects of the practice in particular cases is unnecessary. The NCAA's television restraints, viewed literally, do not take the form of the typical price fix or group boycott. They are not naked restraints, manifestly unrelated to any legitimate cooperative endeavor. Rather, the NCAA, which engages in a host of rulemaking and promotional activities that are conceded to be desirable, if not necessary, for the organization and survival of amateur intercollegiate athletics, argues that the challenged television restrictions are necessary for the conduct of its rulemaking activities. Moreover, it argues that the television restrictions are procompetitive in effect because they make possible the provision of televised football to consumers. While closer scrutiny properly results in a rejection of the NCAA's contentions, they are not so plainly devoid of merit as to warrant dismissal without inquiry into the purpose or competitive effects of the challenged practices. And per se rules are appropriate only where experience indicates that no inquiry into competitive purpose or effect is warranted.

The plaintiffs demonstrated that the NCAA's television restraints have anticompetitive effects. Consequently, under *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979), the next step in the proper analysis is to scrutinize the television

restrictions under the rule of reason to determine whether the evidence proffered by the NCAA demonstrates that the attainment of the procompetitive goals of the joint venture are dependent on the television restrictions. Only if the NCAA meets that burden need the court proceed to balance the anticompetitive effects of the restraints against the procompetitive benefits they make possible. Here, the NCAA offered justifications allegedly showing the importance of the television restrictions for the continued efficacy of its procompetitive functions. But, after reviewing the evidence, the district court correctly rejected those justifications, either because they were not of a type cognizable under the antitrust laws, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), or because insufficient evidence was proffered by the NCAA to demonstrate that the productive activities of the joint venture were, in fact, dependent on the competitive restrictions. The United States submits that the district court's conclusion based on the evidence was correct; in any event, it certainly was not clearly erroneous. The NCAA's restrictions, therefore, were properly found to be an unreasonable restraint of trade in violation of section 1 of the Sherman Act. We also believe that the injunction imposed by the district court, when interpreted in light of the circumstances of the case, constituted a permissible exercise of the district court's equity powers in fashioning relief.

ARGUMENT

Three fundamental elements must be proven before a violation of Section 1 of the Sherman Act is made out: the presence of an agreement, an effect on interstate commerce, and an unreasonable restraint of trade. The presence of the first two elements is not at issue in this case. Thus, the focus of the litigation has been on the issue of whether the agreement among the NCAA's membership constitutes an unreasonable restraint of trade. After a full trial, the district court held that the NCAA's controls constituted per

se violations of Section 1 of the Sherman Act, Dist. ct. op. at 48-67, and alternatively that they violated the Act under the detailed scrutiny called for by the "rule of reason." *Id.* at 68-79. The United States submits that the conduct challenged in the present case is not of the type to which the per se rule is properly applicable on the basis of present judicial experience, and hence that the district court's finding of a per se violation of the Sherman Act was erroneous. We believe, however, that the evidence is sufficient to support the district court's alternative conclusion that under the rule of reason the NCAA's television broadcast restrictions violate the Act, and that as a consequence an injunction against the enforcement of those restrictions against member institutions was appropriate.

I. THE NCAA'S TELEVISION BROADCAST RESTRICTIONS ARE NOT THE TYPE OF CONDUCT THAT A COURT MAY FIND TO BE A PER SE VIOLATION OF SECTION 1 OF THE SHERMAN ACT, *I.E.*, THEY MAY NOT BE FOUND ILLEGAL WITHOUT AT LEAST A BRIEF EXAMINATION OF THEIR POTENTIAL COMPETITIVE EFFECTS.

A. *The NCAA's Conduct Does Not Constitute Per Se Unreasonable Price Fixing*

The language of Section 1 of the Sherman Act prohibits literally every agreement in restraint of trade. From the earliest cases, however, the Supreme Court recognized that Congress could not have intended that the fullest scope be given to this language, for every business contract or agreement does, to some extent, restrain trade. See, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898).[9] To

[9] [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is

determine whether a particular agreement violates the Act, therefore, the Court developed a "rule of reason" analysis, according to which an agreement is held to be unlawful only after it is found "under all the circumstances of the case [to] impose [] an unreasonable restraint on competition." *Arizona* v. *Maricopa County Medical Society*, 102 S.Ct. 2466, 2472 (1982) (footnote omitted); *Standard Oil*, *supra*, at 60, 63-65.

Over the years, however, judicial experience has revealed that certain types of agreements consistently are found under the rule of reason to be unreasonably restrictive. To spare the courts and litigating parties the expenditure of resources required for full rule of reason analysis in each case, and to encourage business certainty, the courts conclusively presume that those restraints are per se unreasonable and violative of the Sherman Act.[10] Once the practice in a particular case is identified within a category

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[9] (Continued)

whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Board of Trade of the City of Chicago v. *United States*, 246 U.S. 231, 238 (1918).

[10] [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.

Northern Pacific R. Co. v. *United States*, 356 U.S. 1, 5 (1958).

defined as per se unlawful, it is condemned without further scrutiny of the intent or actual competitive effects of the challenged conduct. The per se rule, however, is properly applied only to categories of conduct with which the judiciary has had sufficient experience to determine that their existence is almost always "manifestly anticompetitive," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 434 U.S. 36, 50 (1977), so that rule of reason inquiry as to likely competitive effects is unnecessary and wasteful. *Id.* at 50 n.16; *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).

One type of conduct that the Supreme Court consistently has held to be governed by the per se rule is price fixing agreements among competitors. See, *e.g.*, *Maricopa County*, *supra*; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927). The classic price fixing agreement is a naked agreement among horizontal competitors, ancillary to no other business relationship among the parties, to adhere to minimum prices. Early in the development of the antitrust laws the Supreme Court felt it had acquired sufficient experience to conclude that

> [t]he aim and result of [every agreement of this type], if effective, is the elimination of one form of competition . . . . Agreements which create such potential power [to fix prices] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable . . . .

Trenton Potteries, *supra*, 273 U.S. at 397-98. And this conclusion that price fixing agreements are properly subject to per se condemnation has been reaffirmed in recent Supreme Court decisions as well. *Maricopa County*, *supra*, 102 S.Ct. at 2472-75; *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

Recognition that horizontal minimum price fixing agreements are illegal per se does not obviate the task of

determining whether particular practices that may affect price should be viewed as price fixing of the type deemed per se illegal. Not all concerted conduct that may affect price has been deemed price fixing. See, *e.g.*, *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Joint Traffic*, *supra*, 171 U.S. at 567-68. Thus, the legality of information exchanges and product standarization practices has been ascertained under the rule of reason because of judicial recognition that such practices have significant procompetitive potential in certain circumstances. See, *e.g.*, *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). Indeed, the Supreme Court has held that the mere fact that two parties have "literally" fixed the price of goods they sell does not necessarily result in a finding of per se illegality. *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1 (1979);[11] *accord*, Dist. ct. op. at 50. To determine whether the challenged conduct is properly characterized as "per se price fixing," (*Broadcast Music*, *supra*, at 9),

> [the] inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . ., or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Id. at 19-20 (footnote omitted). Accordingly, when defendants proffer justifications for an agreement, which, if

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[11] A contrary rule would have the effect of rendering per se invalid all partnership or joint venture agreements, as the Court noted when it stated, "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Broadcast Music*, *supra* at 9.

proven, demonstrate that the totality of the agreement " 'increase[s] . . . efficiency and render[s] markets more, rather than less, competitive'," *Broadcast Music, supra*, at 20, the mere fact that prices are in some sense "fixed" does not automatically resolve the question of the agreement's legality under the Sherman Act.

On the other hand, the fact that a cooperative joint venture is involved does not mean that its conduct can never be condemned as unlawful without extensive inquiry. The nature of the joint venture's conduct — and not merely its designation as a joint venture — is determinative. See generally Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1521 (1982). If a quick examination reveals that it serves no purpose other than as a mechanism to fix prices, its conduct should be struck down as unlawful without further examination. But if examination discloses the possibility that a restraint may be necessary to conduct productive, efficiency-enhancing, or other procompetitive activity, further consideration under the rule of reason is appropriate.[12]

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[12] *Cf. United States* v. *Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), *mod. and aff'd.*, 175 U.S. 211 (1899), in which the validity of restraints were determined by whether they were ancillary to a legitimate cooperative endeavor on the part of the parties enacting them. Judge Taft stated the test as follows (*id.* at 282):

> [N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract and necessary to protect the convenantee in the enjoyment of the legitimate fruits of the contract . . . .
>
> The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void . . . .

This method of analysis is urged by Professor Bork. See R. Bork, *The Antitrust Paradox* 263-67 (1978).

Applying this analysis to the present case, we submit that the NCAA's television controls are not subject to invalidation under the per se rule. This case does not involve the direct fixing by competitors of the price or other terms of trade of a product or service with which the courts have had a great deal of experience. Nor does it involve a naked price restraint on the part of horizontal competitors having no legitimate cooperative relationship with one another. On the contrary, the NCAA has shown (and plaintiffs do not deny) that a certain amount of cooperation between the colleges is necessary and that its non-television regulations are desirable, if indeed not necessary, for the organization and survival of amateur intercollegiate athletics. And significantly for the present case, the NCAA contends that its television controls are necessary for the enforcement of those regulations. Moreover, it argues that the television controls are procompetitive in effect because they are necessary to provide televised collegiate football to consumers.

In essence the NCAA argues that its challenged conduct is necessary to allow the joint venture to offer a new product — ordinarily a procompetitive activity. It describes itself as a rulemaking and promotional association, like a trade association engaging in permissible regulatory behavior. It also describes itself as — and in fact comprises — a joint selling agency for its member institutions, which have agreed to transfer to it the sole authority to negotiate the sale of their output, *i.e.*, the right to broadcast games in which they participate. And joint selling agencies have not been subject to per se condemnation; rather, at least a limited scrutiny of the effect of the restrictions is appropriate. See, *e.g.*, *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933); L. Sullivan, *Antitrust* § 104 at 292-93 (1977).

To be sure, on further examination, as occurred at trial below, the NCAA's contentions may be shown to be either untrue, unproveable, true but insufficient to outweigh the anticompetitive effects of their restrictive conduct, or

simply irrelevant to the competitive issues cognizable under the Sherman Act. But the NCAA's contentions are not so patently frivolous as to permit their dismissal without at least some scrutiny as to the probable competitive effects of the challenged conduct. And the need for such an examination of competitive effects means, by definition, that application of a strict per se rule would be inappropriate. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).[13]

B. *The NCAA's Conduct Does Not Constitute a Group Boycott Subject to Per Se Condemnation*

The district court characterized the NCAA's conduct as a per se unlawful group boycott. It found that the boycott operated in two ways: by granting exclusive rights to certain networks, NCAA members agreed not to sell their products to other broadcasters; and a school that violated the television exclusivity rules could be expelled from the NCAA and thereby rendered unable to meet member schools in any athletic contest. Dist. ct. op. at 28-29, 62-67.

We submit that the district court erred in characterizing the NCAA's conduct as a group boycott subject to the

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[13] This analysis does not differ significantly from that employed by the district court. Although the court stated that the NCAA's controls constituted an agreement subject to per se condemnation, Dist. ct. op. at 62, it recognized that certain justifications may forestall application of the per se rule, and it reviewed the defenses raised by the NCAA to determine whether they were of this sort. *Id.* at 50-62. Thus the distinction between our analysis and that of the district court is primarily terminological: We submit that, after engaging in scrutiny of the procompetitive justifications proffered by defendants, it is a mischaracterization to state that if the justifications are rejected, the defendants' actions are then "per se" unreasonable. Rather, we believe that the district court actually and quite properly undertook a form of rule of reason analysis to determine whether the practice is an unreasonable restraint of trade, and that this fact should be acknowledged.

per se rule. Although the term "group boycott" has been used over the years in myriad situations, the per se rule has been applied to only narrower classes of activities whose clearly pernicious market effects warrant automatic condemnation. See L. Sullivan, *Antitrust* § 90 (1977). The classic boycott to which the courts have applied the per se rule "constitute[s] efforts by a firm or firms at one level to drive out competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Id.* § 92 at 261. The first of the district court's boycott characterizations is simply that of an exclusive dealing arrangement by a joint venture. Exclusive dealing contracts by their nature have the effect of denying the business covered to non-parties. But this alone has not been considered sufficient reason to strike down such arrangements as per se illegal. Rather, the antitrust legality of exclusive dealing contracts is determined under a rule of reason analysis. *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 74-80 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Deesen* v. *Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *cf. Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961).

There appears to be nothing in the exclusivity provisions at issue that warrants departing from the usual method of determining the legality of exclusive dealing contracts. While the selling party here (the NCAA) represents a combination of competitors, the exclusivity provisions, on their face, do not appear to be a naked attempt by a group of competitors to drive plaintiff competitors out of business. Rather, if as the NCAA alleges, the establishment of the joint venture is necessary to create a new product, legitimate reasons may exist for the joint venture to undertake the marketing of that product as well. Therefore, if the joint venture is permissible on balance because it allows a new product to be created, it would be improper to apply a per se rule to prohibit it from regulating the

marketing of that product without any review of the market circumstances affecting the relationship between the competitive restraints embodied in such marketing regulation and the justification therefor. Of course, analysis of the purpose and effect of the NCAA's intent and the effect of its conduct may compel a finding of illegality under the rule of reason, but the need for such an inquiry indicates that it is inappropriate to treat the challenged conduct as the type of group boycott deemed per se unlawful.

The district court's second boycott characterization would invalidate the efforts of any membership organization to regulate the behavior of its members with the sanction of expulsion. The courts have never held that a group's authority to expel its members renders the group structure tantamount to a group boycott and thus per se unlawful. The expulsion sanction is merely an enforcement vehicle for the underlying rules and policies of the group. Thus the important issue is the competitive reasonableness of the underlying rules (here, the NCAA's television controls), not the existence of sanctions for their violation. See, *e.g.*, *Molinas* v. *National Basketball Ass'n*, 190 F.Supp. 241 (S.D. N.Y. 1961); R. Posner, *Antitrust Law* 207-10 (1976). Again, the necessity for scrutiny of the underlying rule renders the application of per se analysis inappropriate.

II. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE DISTRICT COURT'S CONCLUSION THAT, WHEN EXAMINED UNDER THE RULE OF REASON, THE NCAA'S CONDUCT VIOLATES SECTION 1 OF THE SHERMAN ACT

Because application of the per se rule is inappropriate, the challenged conduct must be examined under the rule of reason. This, however, does not mean that an exhaustive factual and economic analysis of every conceivable economic or other public interest issue raised by this case is required. On the contrary, any purported public benefits unrelated to the promotion of competition may not be con-

sidered in the antitrust balance. Thus, the Supreme Court has cautioned that "the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978). The rule of reason, therefore, requires a court to weigh the injury to competition that may result from the challenged conduct against any enhancement of competition that could not be achieved without the restraint. The court thereby determines whether the restraint imposed "tend[s] to restrict competition and decrease output . . ., or instead [is] designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, supra*, 441 U.S. at 20.

As discussed in detail below, the challenged conduct of the NCAA clearly "restrains" the freedom of NCAA members to negotiate independently for the sale of television rights to college football games. The NCAA alleges, however, that it acts as a joint venture in the development of the college football product and that the challenged restrictions are ancillary to and necessary for the attainment of legitimate competitive purposes. The proper analysis, therefore, is to review the justifications offered by the NCAA in light of the effect of the restraints demonstrated by plaintiffs, to determine whether the NCAA's restrictions are, on balance, procompetitive and output-enhancing or anticompetitive and output-reducing. Only if the NCAA introduces evidence demonstrating that the procompetitive effects of its joint venture efforts are dependent on the significantly anticompetitive provisions of its television rules would there be a need to balance such competitive benefits against the competitive restraints attributable to the challenged conduct. In the absence of any evidence demonstrating procompetitive potential, of course, expeditious condemnation is proper.

The challenged restraint in the present case, we submit, is properly subject to condemnation under a rule of reason analysis. The restraining effect of the NCAA's television rules on independent member sales hardly seems open to reasonable questioning, and the district court's findings in favor of plaintiffs on this point seem correct in view of the record. In any event they are not clearly erroneous. The district court also was correct on both legal and factual grounds in rejecting the justifications proffered by the NCAA in its attempts to defend its conduct from condemnation.

A. *The District Court Correctly Held That Plaintiffs Satisfied Their Burden of Showing the Significantly Anticompetitive Nature of the NCAA's Conduct*

1. "Congress designed the Sherman Act as a 'consumer welfare prescription'. R. Bork, The Antitrust Paradox 66 (1978)." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). As such, the antitrust laws are intended to protect the competitive nature of markets in "our predominantly free-market economy," *Broadcast Music*, *supra*, 441 U.S. at 19, and to help guarantee that the quantity of goods and services sold and purchased and the levels of prices set in the various markets result from independent decisionmaking by the producers and consumers. In this way, competition policy seeks to foster the maximization of consumer welfare.

In the present case, independent decisionmaking by producers (the colleges) has been replaced by a joint venture, which has assumed the role of exclusive selling agent. Absent the constraints imposed on individual members' sales of regional and local television rights, it would be expected that the amount of such broadcasting would be greater than at present. Tr. 252-53, 537-39. The record contains evidence supporting the district court's finding that the prohibition of independent telecasting resulted in the restricted availability of football telecasts. Tr. 859-60, 1003-

07, 1305. Indeed, the district court found that the very purpose of the NCAA's policy was to limit individual member sales. Dist. ct. op. at 27-28. Equally significant as the reduction in available telecasts, however, is the fact that the controls artificially suppressed product diversity, by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and by limiting the number of appearances on television by individual members. According to testimony these restrictions have reduced the opportunity for many smaller schools to appear on television (either locally or regionally), Tr. 252-53, 537-39, and have reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as they would otherwise be able. Tr. 370-71, 856-57.[14]

2. In an attempt to minimize the significance of the competitive distortions resulting from its television policy, the NCAA contends that it lacks market power with respect to advertisers who use other programming to reach their desired audiences. This is an attempt to misdirect the court's attention from the gravamen of plaintiffs' complaint. The extent of the NCAA's market power vis-a-vis television advertisers is not the relevant measure of the defendant's ability to restraint the competition here at issue. The essence of plaintiffs' complaint is not that advertisers are paying too much for network broadcasts. Rather, they correctly assert that *they* are being coerced into giving up their right to compete in the sale of their football television rights as the price of membership in a rulemaking joint

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[14] This type of collective suppression of product diversity can be as anticompetitive as collusive reductions in output. Such behavior interferes with consumer choice and can give rise to the same types of inefficiences that are the ultimate concern of all antitrust prohibitions, *i.e.*, reduced output of desired products and increased consumption of less desired substitute products. See, *e.g.*, R. Dorfman, *Prices and Markets* 155-56 (3d ed. 1978); R. Bork, *The Antitrust Paradox* 98-101 (1978).

venture, access to which is which necessary for participation in the full range of intercollegiate athletics. Thus, the NCAA's power in regulating intercollegiate athletics is the relevant factor in assessing the competitive effects of its restrictive televison rules. The existence of the NCAA as a national rulemaking body for intercollegiate athletics would seem to indicate that a national, all-inclusive, rules body may provide significant economies of scale and other advantages not provided by smaller or regional groupings of colleges. In essence, plaintiffs have demonstrated that the NCAA, comprised as it is of all the major college athletic competitors, has utilized the advantages conferred by its joint venture structure and its position as an industry-wide rulemaking body to condition access (i.e., membership) on each member's willingness to sacrifice certain competitive prerogatives with respect to telecasting its games.

In response to this argument, the NCAA seeks to denigrate the competitive significance of its restriction. It argues that the plaintiffs have felt no antitrust injury because they could form their own supervisory organization. NCAA brief at 50. The district court, however, properly held that the NCAA's disclaimer of market power lacks credibility in view of the fact that all of the major competitors in college athletics are members that it regulates. More importantly, the NCAA offers no satisfactory explanation why plaintiffs should bear the unnecessary costs of seeking to create a duplicative national rules body because they refuse to acquiesce in the NCAA's attempt to impose competitive restraints not justified by the needs for cooperation that justify the joint venture itself. Collaborative efforts by all of the major competitors in any market raise the danger of a diminution in competition. Society tolerates that risk when significant competitive benefits are dependent on industry-wide collaboration. But because of the competitive risks posed by such wide-scale collaboration, no public interest is served — and the interests of consumers may be directly harmed — if competitive restraints un-

related to the proper conduct of legitimate regulatory functions are tolerated. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945).

B. *The District Court Properly Rejected the Justifications Proffered for the NCAA's Television Restrictions*

The NCAA has argued that in the creation of the product college football, it functions as a joint venture, similar to the performing rights societies in *Broadcast Music*. But, as indicated *supra* at 23-26, the fact that the NCAA performs some legitimate joint venture activities only serves to begin the rule of reason inquiry, not end it.[15] In view of the significant restraining characteristics of its television

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[15] Peculiarly, the NCAA later compares itself to a cartel, and argues that its agreement should not be "red-penciled" to save the portions that benefit plaintiffs and strike down those that harm them. NCAA brief at 50-52. The cartel description is plainly inconsistent with its earlier assertions (NCAA brief at 11-14, 17-20) that it does not operate simply as a cartel imposing naked restraints upon competition, but rather acts as a joint venture in which there is partial integration of the business activities to perform functions that are properly the subject of collaboration. Thus this is not a case in which plaintiffs benefit from some of the illegal behavior of a cartel and are harmed by other parts. Rather, the "benefits" discussed in this case are the productive activities of the joint venture, and the "harms" flow from some joint venture conduct found by the district court to be unrelated to the conduct of those legitimate activities. Indeed, the fundamental question of this case, as acknowledged by all the parties, is the relationship between the legitimate NCAA functions and the challenged conduct. And if the challenged conduct is unrelated to or unnecessary for the achievement of its legitimate functions, it may be prohibited. Indeed, contrary to the NCAA's "red-penciling" argument, the Supreme Court has repeatedly held that when restraints are found to be overbroad in relation to legitimate joint activities, the restraints alone may be excised while the valid portions saved. See, *e.g.*, *Silver*, *supra*, at 361-67; *Associated Press*, *supra*, at 21-23; *United States* v. *Terminal R. Ass'n of St. Louis*, 224 U.S. 383, 409-12 (1912).

restrictions, the NCAA had the burden of demonstrating a sufficiently strong relationship between the restraints and the capability to conduct the productive activities.[16] The NCAA did in fact proffer several justifications, and the district court heard the evidence presented as to their validity. It then concluded not only that the NCAA had failed to carry its burden of proof, but also that plaintiffs' evidence was more convincing. We believe that sufficient evidence exists to sustain the conclusion reached by the district court.[17]

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[16] The NCAA later argues, by analogy to the *in pari delicto* defense, that because plaintiffs admittedly received some benefits from its activities, they have suffered no net antitrust injury," and thus may not bring this suit. NCAA brief at 53-55. This argument is unsupportable. The courts have stated that the accrual of benefits to plaintiffs from challenged conduct does not prevent the allegation of antitrust injury necessary for standing. See, *e.g., Smith* v. *Pro-Football, Inc.*, 593 F.2d 1173, 1175 n.2 (D.C. Cir. 1978). In addition, in *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the Supreme Court held precisely to the opposite effect of that asserted by the NCAA. That case held that the policy in favor of antitrust enforcement is sufficiently important that partial participation in the challenged conduct does not prevent standing to private plaintiffs. Rather, it has the limited effect of reducing the amount of damages the plaintiff may receive. But this is of no concern in an injunctive suit, such as the present, where plaintiffs will receive no windfall or improper benefit from the relief in this case.

Finally, this issue is irrelevant in the present case because, as discussed at n.15 *supra*, the "benefits" accruing to plaintiffs were the result of the NCAA's legitimate joint venture regulatory activities. Thus these benefits do not derive from the plaintiffs' participation in cartel behavior, which in the context of *in pari delicto* would have to be offset against any harms inflicted by the cartel.

[17] In particular we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges, *i.e.*, how the product would be damaged if colleges were granted the right to contract independently with local stations for the broadcasting of individual games.

[APPENDIX]

1. The NCAA maintains that its television controls are necessary to maintain a competitive balance among the teams that play against one another on television. It argues that absent some means to retain parity among the competing teams, superpowers would develop that will consistently crush their rivals. Consumers would tire of predictable events, and televised football would be replaced by other entertainment that provides the crucial ingredients of close matches and vigorously-competing participants. NCAA brief at 25-27. The district court correctly rejected this argument.

There is little, if any, evidentiary support for the NCAA's position. As the district court noted, the NCAA has not felt the need to impose restrictions upon the telecasting of college basketball games, even though the need for competitive balance, it may be presumed, is as urgent in that sport as it is in football. Dist. ct. op. at 8. The result has not, apparently, been a disastrous imbalance in basketball competition. Indeed, the recent increase in the number of teams (from 32 to 48) which are invited to participate in the NCAA basketball championships indicates that elimination of the ability of member schools to compete in the sale of television rights to their games is not necessary to promote adequate competitive balance. Moreover, witnesses testified that a loosening of the NCAA's restrictions would result in the proliferation of televised football on the local and regional levels, Tr. 252-53, 537, with a concomitant increase of television income to those colleges unable to appear under the NCAA controls. Thus to the extent that such income may be translated into com-

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[17] (Continued)

Indeed, the court below noted this as a major distinction between the present case and *Broadcast Music*, in which, although the performing rights societies organized umbrella sales agreements, individual authors retained the power to sell the performing rights to their compositions on an individual basis. Dist. ct. op. at 55-56.

petitive ability, the restrictions actually may work to impede attainment of the goal of competitive balance.[18]

The NCAA, of course, offered conflicting testimony. But as the district court noted, although various witnesses for the NCAA argued that the restrictions were necessary, none "was able to articulate any credible reason as to *why*. . . ." Dist. ct. op. at 58-59 (emphasis in original). In essence the district court found that the NCAA has attempted to justify its television restrictions, which have a clear and immediate restraining effect upon the marketing aspects of college football television rights, in terms of, at best, indirect and speculative benefits to the competitive balance and amateur status of the sport. In this circumstance, the court did not err in dismissing this defense. Indeed, the district court properly dismissed the competitive balance justification because the NCAA failed to demonstrate that the full panoply of its television restrictions has any direct bearing on the attainment of this goal.[19]

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[18] The idea that a nation of over two hundred million citizens can not produce a sufficient number of skilled college football players to provide reasonable competitive balance strains credulity. In any event, there is no evidence that competitive parity throughout the entire NCAA Division I membership is necessary to provide football that consumers will want to support. It is well known that there exist significant disparities between the qualitative level of football played in different conferences, *e.g.*, compare the "Big Eight" to the "Ivy League." Nonetheless, there are many supporters of "Ivy League" football. At best, there appears to be a need for some semblance of competitive parity within a conference, but the NCAA made no attempt to justify its national restrictions on the basis of such intra-conference needs.

[19] In an attempt to avoid the "clearly erroneous" rule, the NCAA argues that the district court acted improperly by "simply reject[ing]" the evidence that "the television rules promote balance." NCAA brief at 26. It dislikes the fact that the district court rejected the tesimony the NCAA presented because the court found that the winesses "could not adequately verbalize why the effect occurs." *Ibid.* The district court, however, did not "simply reject" the NCAA's evidence. It found it to lack credibility

2. The district court also correctly rejected the NCAA's contention that uncontrolled telecasting would result in the reduction of live attendance at college football games. To the extent that this is but a variant on the argument regarding competitive comparability, it suffers the same defects discussed above. In addition, the live gate defense is justified only on the unsupported grounds that "live attendance is the lifeblood of many schools," and that "di-

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[19] (Continued)

compared to the conflicting evidence proffered by the plaintiffs. The NCAA's effort to avoid the "clearly erroneous" rule with respect to the district court's factual findings, therefore, must be rejected. In addition, the NCAA misconceives the role of the parties and the court at trial. As noted above, once plaintiffs satisfied their burden of demonstrating significant anticompetitive effects attributable to the challenged conduct, the burden shifted to the NCAA to show that the restraints were needed in order to sustain its procompetitive activiites. That is, to the extent that competitive balance among football teams may be considered an integral part of the college football product created by the joint venture, the NCAA was required to come forward with evidence that the television controls were directly responsible for the attainment of that end. The role of the court is to determine the credibility of the witnesses and whether their testimony satisfied the burden of proof when considered against the conflicting evidence presented by the other parties. Thus the court was not restricted to rejecting the evidence only if it was "illogical" or "if there were contrary evidence." NCAA brief at 26. Even if the evidence were fully logical and uncontroverted, the court could determine that it was insufficient to satisfy the burden placed on defendant.

In this case, the district court reviewed the evidence and determined that it did not satisfy the burden. That decision must be affirmed unless clearly erroneous, and the NCAA has failed to show that the court's finding was clearly erroneous. A review of the testimony cited (NCAA brief at 26 n.7) in fact reveals that the district court's finding not only was not clearly erroneous but was quite correct. Most of the NCAA's testimony consists of either the worry that in the absence of controls football powerhouses would develop, acknowledgments that television exposure helps recruitment, or unsupported assertions that the television controls help achieve competitive balance. No evidence was presented to explain how they do so.

version of audience to TV may undermine college sports at other schools, reducing the effectiveness of competition and the amount of enjoyment from live attendance in general." NCAA brief at 20-21. These dire predictions simply are unsupported by evidence.

To the extent that the NCAA and amicus ABC contend that there are noneconomic reasons for protecting the live gate of smaller schools, and that the NCAA's television restrictions are necessary to achieve such noneconomic ends, the argument is irrelevant to antitrust analysis.[20] Indeed, it is the type of defense rejected by the Supreme Court in *National Society of Professional Engineers*, *supra*, 435 U.S. at 689-92. Congress enacted the antitrust laws to implement a fundamental policy of competition. While Congress may determine that antitrust policies should give way to other regulatory methods and objectives by creating an antitrust exemption, it is improper for private parties or the courts to indulge in a balancing of policies and conclude that the goals expressed by Congress in the antitrust laws should be overridden. *Ibid.* Resolution of such conflicts is properly obtained from Congress itself, the body with the authority to weigh and select from among conflicting social policies.

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[20] Indeed, one would be hard put to define the protection of weak competitors from the rigors of the marketplace as "procompetitive." The defense that the NCAA has engaged in anticompetitive conduct to assist weak competitors ignores the repeated assertion that the purpose of the antitrust laws is to protect competition, not specific competitors. See, *e.g.*, *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962); *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir.), *cert. denied*, 363 U.S. 843 (1959).

III. PLAINTIFFS HAVE ALLEGED ANTITRUST INJURY AND THUS ARE THE PROPER PARTIES TO BRING SUIT

The NCAA's argument that plaintiffs have failed to establish antitrust injury and therefore are not the proper parties to seek relief (NCAA brief at 45-55) is contrary to overwhelming legal precedent and finds no support in the statutory language or legislative history. Section 4 of the Clayton Act, 15 U.S.C. 15, provides a private treble damage remedy for any person suffering injury to its "business or property" as a result of an antitrust violation. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330 (1979). Plaintiff, are alleging precisely that type of injury to the extent they assert that they are being deprived of the extra income they would obtain if they were allowed to sell the television rights to their football games in a competitive market. Plaintiffs, of course, are seeking injunctive relief under Section 16 of the Clayton Act, not damages. Their standing to sue for damages, however, is relevant to their standing to sue for injunctive relief since it has been held that standing requirements under Section 16 are lower than under Section 4. See, *e.g.*, *Schoenkopf* v. *Brown & Williamson Tobacco Co.*, 637 F.2d 205, 210 (3d Cir. 1980); *Jeffrey* v. *Southwestern Bell*, 518 F.2d 1129, 1132 (5th Cir. 1975); In re *Multidistrict Vehicle Air Pollution M.D.L. 31*, 481 F.2d 122, 130-31 (9th Cir.), *cert. denied sub nom. Morgan* v. *Automobile Mfrs' Ass'n*, 414 U.S. 1045 (1973). *Cf. Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 260-61 (1972).[21]

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[21] The distinction between the two sections for standing purposes is sensible from the view of the policy that caused the courts to erect standing restrictions for antitrust damage actions — the fear of redundant recoveries or the litigation expense and complexity necessary to measure incidental harm. Obviously this fear is irrelevant in an injunctive suit, so the need to limit the universe of potential plaintiffs in a § 16 case is less urgent. *Schoenkopf*, *supra*, at 210; *Jeffrey*, *supra*, at 1132; *Multidistrict Vehicle Air Pollution*, *supra*, 481 F.2d at 130

The NCAA relies on *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), for the asserted proposition that the antitrust laws are designed to protect consumers, not producers, and that, therefore, suits by producers should be faced with "suspicion." NCAA brief at 46-47. That reliance is misplaced. Nothing in *Brunswick* indicates an intention on the part of the Supreme Court to overrule the numerous cases that have allowed competitors to recover for financial injury suffered as a result of an antitrust violation that denied them the ability to compete in the market.[22] In *Brunswick* itself the Court denied the plaintiff recovery not because it was a competitor of the defendant, but rather because the alleged harm flowed from an enhancement rather than a crippling of competitive conditions. In the present case, however, plaintiffs have alleged and indeed demonstrated that their injury resulted directly from "the anticompetitive effect . . . of the violation . . . ." *Brunswick, supra* at 489. Thus they are precisely within the group of parties that have demonstrated antitrust injury for the purpose of Section 4.

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[22] Among the many cases allowing injured competitors to sue for treble damages are *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir.), *cert. denied*, 444 U.S. 1093 (1980); *Atlas Bldg. Prods., supra.* Similarly, the standing of such competitors to seek injunctive relief under Section 16 is well recognized. See, *e.g., Utah Pie, supra*; *International Tel. & Tel. Corp.* v. *General Tel. & Electronics Corp.*, 518 F.2d 913 (9th Cir. 1975); *Credit Bureau Reports* v. *Retail Credit Co.*, 476 F.2d 989 (5th Cir. 1973).

IV. THE INJUNCTIVE RELIEF GRANTED IS APPROPRIATE TO THE ANTITRUST VIOLATION FOUND, AND ANY QUESTION DEFENDANTS HAVE AS TO THE SCOPE SHOULD BE DIRECTED TO THE DISTRICT COURT IN THE FIRST INSTANCE

On finding a violation of the antitrust laws, the district court has broad discretion in fashioning relief. See, *e.g.*, *Zenith Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 132-33 (1969); *International Salt Co.* v. *United States*, 332 U.S. 392, 400-01 (1947). Its remedial judgment may be set aside only if it constitutes an abuse of discretion. See, *e.g.*, *United States* v. *National Lead Co.*, 332 U.S. 319, 334-35 (1947); *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948). We submit that the injunctive relief entered by the district court is reasonably related to the antitrust violation found, and accordingly should be affirmed.

1. The function of injunctive relief in an antitrust case is to prohibit repetition of the illegal conduct and to restore competitive market conditions. *International Salt*, *supra*, at 401; *National Lead*, *supra*, at 335; In re *Multidistrict Vehicle Air Pollution*, 538 F.2d 231 (9th Cir. 1976). While a district court has the discretion to determine that a prohibitory injunction is unnecessary due to the defendant's promise not to repeat its prior illegal conduct, issuance of a prohibitory injunction is the norm, rather than an abuse of the district court's broad remedial discretion. *Zenith*, *supra*, at 132; *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964). For these reasons we strongly disagree with the NCAA's recommendation (NCAA brief at 61) that it simply be "relieved" of the provisions of the injunction and that any subsequent television controls it devises be scrutinized anew under the antitrust laws. Certain conduct by the NCAA has already been adjudged in violation of the antitrust laws. On the basis of this holding, it is entirely appropriate that the NCAA be prohibited from continuing to engage in such conduct. It would simply

waste judicial resources and impose an improper burden on the plaintiffs to stay the district court's hand now and require a relitigation of the same questions at some future date in the context of whatever new controls and contracts the NCAA establishes.

2. The NCAA asserts (NCAA Br. at 55-57) that paragraph 3 of the injunction either is unduly vague or overly broad to the extent that it prohibits conduct not related to the violations found. We believe, however, that when read in light of the violations found, the decree is reasonably clear, and that any questions the NCAA has as to whether the injunction would bar it from taking various actions related to the televising of individual member football games should be directed, in the first instance, to the district court.

Paragraph 3 of the injunction imposed by the district court prohibits the NCAA "from enforcing or attempting to enforce the provisions of the contract above described and from making any other contract of similar kind or nature in the future." We submit that this language should be construed in light of the violation found. The essence of the NCAA's restrictive conduct is its arrogating to itself the role of exclusive selling agent, *i.e.*, forbidding individual schools from independently selling the television rights to their games to network or local broadcasters. Consequently, the language "other contract of similar kind or nature" is best read as referring to provisions that would have the practical effect of depriving member schools of the right independently to market their games in order to promote joint selling of that product.

Read in this light, the district court's decree would not raise many of the concerns expressed by the NCAA in its brief.[23] For example, contrary to the NCAA's assertion

[23] On the other hand, certain of the NCAA's suggestions, such as a system of "pass-over payments" and continued blackout rules to protect live attendance, *id.* at 58-59, should not be accepted, because they retain aspects of the present scheme that have been determined to be anticompetitive.

(NCAA brief at 60), nothing in the district court's opinion or decree would prohibit the NCAA from banning a member school's appearance on television because of its violation of the various NCAA regulations directly designed to preserve the amateur nature of the sport and to equalize the inputs devoted to the game (*i.e.*, the number of scholarships and coaches, time allowed for practice, etc.). The purpose of such sanctions is not to interfere with competitive marketing; therefore, the decree cannot be read reasonably to constrain the NCAA's sanctioning powers in that respect. Similarly, we do not share the NCAA's concern (NCAA brief at 58) that the decree prohibits it from contracting with television exhibitors for an "NCAA game of the week" season package in which participation by individual member schools would be optional. This would preserve the other competitive options of member schools and allow the NCAA to offer a product in competition with those offered by other producers, thereby providing consumers with the multiplicity of supplier options characteristic of a competitive market. By a similar line of reasoning, we do not share the NCAA's concern (*ibid.*) that the decree would prohibit it from contracting for the telecasting of post-season playoffs for football, as it does in basketball. Since the participants in such games are not known until shortly before they occur and there may be a need for advance planning by broadcasters, it would not unduly restrain any individual member's rights for the NCAA to act as a selling agent for the advance sale of television rights to its post-season playoffs. In any event, neither the district court's opinion nor its decree focused on the televising of post season playoffs, and any questions on that subject, therefore, should be addressed, in the first instance, to the district court.

CONCLUSION

The jugdment of the district court should be affirmed.

Respectfully submitted.

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No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do exceptional circumstances exist which justify a review of the district court's findings of fact; if so, were those findings clearly erroneous?

2. Are educational institutions engaged in commercial activity exempt from antitrust rules condemning as *per se* unlawful horizontal agreements fixing prices and limiting output?

3. Can unreasonable restraints upon economic activity, both at the horizontal and vertical levels, be justified under the antitrust laws on the basis of asserted benefits which were not shown to have any logical relationship to the restraints?

4. Did a scheme under which horizontal competitors at one marketing level agreed with horizontal competitors at another marketing level to exclude purchasers of a unique product for which no reasonable alternatives exist violate the antitrust laws?

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BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Association of Independent Television Stations, Inc.[1] submits this brief *amicus curiae* in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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[1] The following abbreviations will be used throughout:

"INTV" is the Association of Independent Television Stations, Inc.

"NCAA" is the petitioner, National Collegiate Athletic Association;

"Oklahoma" is respondent The Board of Regents of the University of Oklahoma; "Georgia" is respondent the University of Georgia Athletic Association;

[Footnote continued]

INTEREST OF AMICUS CURIAE

INTV is a national association representing some 97 independent television broadcast stations, that is, stations not affiliated with any national network and therefore which are unable to participate in the NCAA television plan and do not receive NCAA football games from a network. Independent stations produce or are in the market to purchase programming and are direct competitors of broadcast and cable television outlets for ABC, CBS and Turner, exclusive participants in the NCAA Television Plan. The NCAA plan effectively prevents universities from being able to sell television rights to their football games to independent stations, and prevents independent stations from purchasing and broadcasting such games in competition with the networks.[2]

COUNTERSTATEMENT OF THE CASE

Petitioner's statement of the case consists almost entirely of NCAA's imaginings, which it failed to prove either in the district court, which heard the evidence, or in

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[1] [Continued]

"Pet." and "Petition" refer to the Petition for a Writ of Certiorari.

References to the district court and Tenth Circuit opinions shall be to the Petition's appendix and designated either "C.A." or "D.C."

"NCAA Television Plan," "NCAA Plan" and "Television Plan" refer to NCAA's set of rules governing permissible television coverage of NCAA college football games on the national television networks through the series of agreements between NCAA and three television networks ABC, CBS and Turner.

[2] As the NCAA acknowledges, "the Plan authorizes only limited 'exception' telecasts that might compete with the networks or other live games. Major colleges generally may telecast their games outside the contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out." (Pet. 3) The district court found: " . . . many more games

the court of appeals, which reviewed the entire record. The proven facts, pertinent to this petition, are these:

This case involves the sale by colleges and universities to broadcasters of the right to telecast college football games (D.C. 74a). NCAA football is the product which INTV members wish to buy from schools such as Oklahoma and Georgia, but because of the NCAA television plan, cannot.

Oklahoma, Georgia and some 900 other colleges and universities are members of the NCAA, an association of independent, four year colleges and universities. These colleges and universities are, like legal and medical professionals, in a commercial as well as a professional undertaking.[3] They compete with each other "for students, for faculty, for government grants, and for philanthropic support. It is a big business and millions of dollars are involved. The same is true of college football. It is a business, and it must behave in a businesslike manner to insure its future viability" (D.C. 55a). The NCAA, while seeking special, non-commercial treatment under the antitrust laws, nevertheless acknowledges: "The size of the 1982-85 contracts understates the stakes of the case; the present value of a stream of payments of $74.288 million, extended for 32 years (the length of time the NCAA has had a TV Plan) and discounted at 2% . . . is $1,743,000,000." [citations omitted] (Pet. 8, n.)

NCAA controls all forms of televising of football games during the college football season (D.C. 43a). NCAA acts as the exclusive bargaining agent for all its members for the sale of television rights to college football games (D.C. 49a). Under its present Television Plan, NCAA has sold exclusive broadcast rights to ABC, CBS

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would have been broadcast locally were it not for the cumbersome requirements and procedures entailed in applying for an 'exception telecast'" (D.C. 59a).

[3] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

and Turner. NCAA sets the specific uniform amounts the networks will pay for national and regional telecasts.[4] NCAA also sets the minimum and maximum permitted telecasts, the maximum number of appearances per school and prohibits the sale of football telecast rights outside the NCAA Plan with very limited exceptions (D.C. 58a-64a).

The set fee agreement has grossly distorted the prices for college football broadcasts which would obtain in a free market, as even NCAA's expert admitted (D.C. 66a): "[W]ere it not for NCAA controls, many more college football games would be televised" (D.C. 66a). "Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level" (D.C. 66a), limiting "production to a level far below that which would occur in a free market situation" (D.C. 67a).

The evidence at trial failed to show any economic or any other justification for the NCAA's economic restraints. The evidence failed to show any connection between the Television Plan and live game attendance (D.C. 68a-70a). Nor did the evidence show any connection between competitive balance and the NCAA Plan (D.C. 70a). Indeed, far from creating any "competitive balance" the evidence at trial showed, and the trial court found, that the NCAA plan has created and perpetuated a "power elite" in college football (D.C. 98a). Football is the only sport in which the NCAA restrains the business of telecasting intercollegiate games (D.C. 48a). College basketball also attracts national television coverage, but is not subject to the restrictions of the NCAA Plan (D.C. 47a).

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[4] NCAA's Executive Director has admonished subordinates to use the word "recommend" rather than "set" in reference to price. The trial court found, on all the evidence, that this was "an attempt to conceal NCAA's power to fix the price of college football games" (D.C. 78a). The Court of Appeals affirmed (C.A. 15a).

It is virtually impossible for a college to operate a fully-rounded intercollegiate athletic program without NCAA membership (D.C. 53a-54a). A college cannot operate outside the Television Plan and freely sell football broadcast rights to, for example, a television station member of INTV, because it would be expelled from NCAA as a result and NCAA rules would prohibit any member college from playing televised football games with non-NCAA members (D.C. 68a).

College football is a uniquely desirable product to broadcasters in the time slot when it is available, Saturday afternoons during football season (D.C. 71a-73a). The NCAA Television Plan prevents willing sellers (such as Oklahoma and Georgia) from selling their product to willing buyers (such as television station members of INTV) in conformance with the free market principles of the antitrust laws (D.C. 66a-67a).

REASONS FOR DENYING THE WRIT

NCAA's petition really asks this Court to do two things: (1) to review and overturn findings of fact made by the trial court and affirmed by the Tenth Circuit upon its review of the entire record and (2) to accept novel and radical views of antitrust law espoused by a minority enclave of theorists which would overturn nearly a century of jurisprudence under the Sherman Act. A writ of certiorari should not issue to do either.

I.

CERTIORARI SHOULD NOT ISSUE TO REVIEW THE EVIDENCE AT TRIAL AND THE FINDINGS OF THE TRIAL COURT

Two fundamental principles guide this Court in addressing challenges to findings of fact at trial; the NCAA ignores each of them.

First, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of

witnesses." F.R. Civ.P., Rule 52(a). This Court has twice recently reaffirmed its adherence to the literal and strict requirements of Rule 52:

> Our recent decision in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), emphasizes the deference Fed. Rule Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . ." At ——, 102 S.Ct., at 1789.

Rogers v. Herman Lodge, —— U.S. ——, 102 S.Ct. 3272, 3278 (1982). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108 (1969), the Court held:

> The question for the appellate court under Rule 52 (a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.

Those challenging findings of fact under the "clearly erroneous" standard face "an almost insurmountable burden." *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959).

Second, "exceptional circumstances" must be present before this Court will review a district court's factual findings. "A court of law, such as this Court is, rather than a Court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917). Additionally, this Court does "not grant a certiorari to review evidence and dis-

cuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Even where a petition argues that findings of fact were clearly erroneous (and NCAA never makes this argument), review will not be granted absent the most exceptional circumstances:

> In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous.

Branti v. Finkel, 445 U.S. 507, 512, n.6 (1980).

NCAA not only ignores these principles, it also ignores the facts found against them. For example, central to the Petition's thesis is the assertion:

> There are procompetitive benefits. We cannot describe all of them here, but one so stands out that it alone precludes *per se* analysis.[9] The Plan and contracts spread national and regional TV appearances among more teams than would be the case in their absence. This puts the teams on more equal footing in recruiting new players and financing their programs. That is to say, it promotes "balance."
>
> * * * *
>
> [9] A second procompetitive effect is that the Plan and contracts increase live attendance at games by reducing the conflict between telecasting and live games. The increase in live attendance preserves the aura and excitement created by crowds, which in turn makes football more attractive (as a live rather than "studio" event) for television viewers, networks, and advertisers.

(Pet. 14 and n.)

At trial, NCAA failed to prove these assertions (D.C. 68a-70a). The district court found as a fact that, far from promoting balance, the NCAA plan has perpetuated a "power elite" in college football (D.C. 98a).

In addition to ignoring the trial court's fact findings, NCAA seeks to avoid them with a piece of linguistic legerdemain. NCAA poses as one of its questions for review:

> Whether in order to avoid application of the *per se* rule the defendant in an antitrust case must prove not only the existence and extent of procompetitive benefits but also the "necessity" of the contractual arrangements.

It asserts:

> The court conducted the survey with its thumb on the scale, though: it held that the *per se* rule applies unless the defendant establishes not only that its conduct is procompetitive in fact but also that the restraints it has chosen are "necessary" to the achievement of these procompetitive results (App. A, *infra*, 11a & n.9, 15a; see also 13a & n.14).

The District Court held that a non *per se* restraint would be lawful if, among other things "it is *reasonably* necessary to complete the legitimate purpose of the arrangement and of the broader scope than *reasonably* necessary." (D.C. 95a). From the context of the district court and appellate opinions, both courts required no more than some logical causal connection between the challenged restraint of trade and the claimed benefit. NCAA failed to prove *any* connection between the restraints of the Television Plan and the alleged benefits (D.C. 60a-70a).

II.

A GRANT OF CERTIORARI WOULD INVITE CONDUCT LONG HELD TO BE ILLEGAL

Very little conduct is *per se* unlawful under the antitrust laws: price fixing, horizontal agreements to restrict output or divide markets, group boycotts, tying arrangements. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958). These few rules stand as clear signposts to prohibited commercial conduct. "The costs of judging business practices under the rule of reason . . . have been reduced by the recognition of *per se* rules."

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343 (1982). See, F. Scherer, *Industrial Market Structure and Economic Performance*, 438-443 (1970). If NCAA's petition is granted—whatever the outcome on final review—competitors will be encouraged to fix prices, restrict output and divide territories in the hope that they will be permited the chance to justify them economically. Antitrust law does not need such additional uncertainty. Our over-crowded courts do not need the certain increase in litigation that would follow.[5]

The district court found that NCAA controlled the price to be paid to teams participating in the Television Plan and made it impossible for the teams to negotiate any higher price for broadcast rights to their football games (D.C. 64a-65a). NCAA's expert conceded that the fee arrangement grossly distorted free-market forces. The Tenth Circuit affirmed the district court's ruling that the Television Plan constitutes *per se* illegal price fixing (C.A. 15a). The district court also found NCAA to have violated the antitrust laws *per se* in the horizontal agreement to restrict output. Both the district court and court of appeals found an unreasonable restraint in the bi-level horizontal agreements eliminating in most cases NCAA members' abilities to sell football broadcast rights outside of the Television Plan to, for example, a member station of INTV, or any other individual television station, network-affiliate or independent.

NCAA's petition is a transparent attempt to do away with *per se* rules against price fixing and horizontal agreements to limit output. The argument is but another expression of a radical polemic which disagrees

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[5] The overcrowding of the federal courts in general, and of the Supreme Court in particular, has reached what the Chief Justice has termed "a disaster area," and prompting suggestions for reform from most of the nine Justices. (Newsweek, February 21, 1983, Pgs. 81-83; Congressional Quarterly Weekly Rpt., September 18, 1982, Pg. 2314)

with much of American antitrust jurisprudence. NCAA's attorney, Professor Easterbrook, a member of the so-called "Chicago School," has, for example, recently written in favor of "Maximum Price Fixing," 48 U. Chi. L.Rev. 886 (1981) ("Easterbrook"). He found the fee agreement among competing physicians in *Arizona v. Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), *rev'd* 457 U.S. 332 (1982), to be a "textbook example" of "beneficial" price fixing. *Easterbrook* 894-95. This Court did not agree:

> Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices. The *per se* rule "is grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Rule—Preface and Perspective, 57 Nw.U.L.Rev. 137, 142 (1962).

457 U.S. at 348.

Maricopa condemned the physician's price fixing as being *per se* unlawful for the same reason the district court condemned a price fix setting at the same price the Oklahoma-Southern Cal football game and Citadel-Appalachian State, "a gross distortion of free market forces" according to NCAA's own witness (D.C. 66a).

NCAA would also justify its price fixing and other restraints on the theory that the competing colleges and universities are engaged in a joint venture. The Ninth Circuit was once misled into accepting a like argument in *Radovich v. National Football League*, 231 F.2d 620, 622 (9th Cir. 1956), but this Court reversed, 352 U.S. 445 (1957). The term "joint venture" is nothing but a generality for a certain kind of concerted activity, and

concerted activity is the central focus of the antitrust laws. The Court held in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951):

> "Nor do we find any support in reason or authority for the proposition that agreements between *legally* separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture'. Perhaps every agreement and combination to restrain trade could be so labeled."

NCAA argues that "football entails both competition and cooperation. Every game has two teams, and the competition must be balanced or the games will not be attractive . . . Balance is procompetitive because it enhances output" (Pet. 15). This hypothetical argument ignores that the trial proved no relationship between any so-called competitive balance and the challenged restraints (D.C. 68a-70a). The question the district court and court of appeals addressed—and NCAA ignores—is not whether *some* rules of football or amateurism may be lawful but whether price fixing, restriction of output and excluding would-be buyers of a unique product can be reconciled to the antitrust laws.

The combination of restraints in NCAA's Television Plan which effectively prevent member universities from selling television rights to their football games to members of INTV and other local television stations, makes NCAA's challenged practices entirely different from those in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). ASCAP "members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights to license public performances, along with the rights to license the use of their compositions for other purposes." 441 U.S. at 11.

NCAA also implies, though does not straightforwardly argue, that "because of the amateur and educational

nature of college football, the application of the ordinary approach to antitrust is unwarranted" (Pet. 7).[6] Any notion that learned, educational, amateur or any other profession or calling engaged in commerce is exempt from the full force and effect of the antitrust laws was rejected in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). Activities in commerce of whatever nature are subject to the antitrust laws. No implied exemption is permitted. *Id.* at 787-88. Applying the *per se* rule against price fixing to the medical profession, this Court recently reaffirmed the rule of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940):

> We are equally unpersuaded by the argument that we should not apply the per se rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S., at 222.

Arizona v. Maricopa County Medical Society, 457 U.S. at 349.

Higher education is big business. College football is big business. *Per se* rules are as applicable to college football as to any other area of commerce.

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[6] The district court found that NCAA chose not to seek an exemption from Congress for its Television Plan because it believed Congress would decline the request (D.C. 78a).

CONCLUSION

The petition for a writ of certiorari should be denied or, if granted, the Tenth Circuit should be summarily affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether an agreement among universities to establish television packages for football may be held unlawful per se, despite the existence of procompetitive features, because it reduces the number of different games shown on television.

2. Whether in order to avoid application of the per se rule the defendant in an antitrust case must prove not only the existence and extent of procompetitive benefits but also the "necessity" of the contractual arrangements.

3. Whether college football television programming on Saturday afternoons is a separate market for antitrust purposes.

4. Whether a process of competitive bidding ending in the letting of contracts for the telecasting of college football must be treated as a suppression of competition because, once the contracts have been signed, there is no further rivalry game-by-game for broadcast rights.

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v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 707 F. 2d 1147. The opinion of the district court (Pet. App. 41a-133a) is reported at 546 F. Supp. 1276.

JURISDICTION

The judgment of the court of appeals (Pet. App. 137a) was entered on May 12, 1983. The court of appeals' order denying a petition for rehearing and suggestion of rehearing en banc (Pet. App. 139a) was entered on June 23, 1983. The petition for a writ of certiorari was filed on August 13, 1983, and was granted on October 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal . . ."

STATEMENT

1. The NCAA establishes rules for the conduct of intercollegiate sports among its members. It was founded near the turn of the century in response to public outcry about the increasing violence, injury, and professionalism in college football. It is an unincorporated association of some 785 public and private colleges and universities, together with more than 100 athletic conferences and other organizations (Pet. App. B, 42a). The member colleges and universities collectively deliberate and adopt the rules, for a wide variety of sports, at annual conventions.

The NCAA's football policies run the gamut from the rules of play and basic prohibitions of payment to student-athletes (which would violate the amateurism policy) to the most sophisticated controls on the recruiting and academic eligibility of student-athletes, the size of coaching staffs, the times of practice, the number of games that may be played, and the telecasting of regular season games. This case involves the telecasting rules.

A bylaw, a Television Plan, and the contracts between the NCAA and three television networks (ABC, CBS, and Turner), govern the live televising of football games of the NCAA's members (A. 35-125, 221-22). Under the Plan and contracts, ABC and CBS each present 14 "exposures" of football every fall (an exposure is a time slot on the network, and the network may show a national game or multiple "regional" games in the slot), and the Turner "superstation" cable TV network presents 19 evening games.

Although the Plan and contracts create telecasting opportunities, they also restrict the time and manner in which universities may telecast their games. The limits take several forms. First, only a designated number of games are shown on network telecasts (A. 41-44). Second, there are limits on the number of times any university may appear on national (or regional) telecasts in a two-year period, and the networks have corresponding obligations to show a minimum number of different teams (A. 52-54). Third, there are practical limits, given the existence of the contracts, on the ability of any university to hold out for payments higher than those made to other schools for games that are telecast. Fourth, the Plan authorizes only limited "exception" telecasts that might compete with the networks or other live games. Major colleges generally may telecast their games outside the network contracts only if they are sold out or are more than 400 miles from the visiting teams' campuses, and the telecasts would not interfere with attendance at any other game that is not sold out. There are other exceptions for less prominent football programs, including those that have not recently been on network television. Telecasts of post-season bowl games also are outside the scope of the TV Plan and contracts. The exceptions are described at A. 62-67, 151-56.

Plans with similar features have been in place since 1951 (A. 241, 279, 281-83, 336-38). The plans for 1951-53 were submitted to the Antitrust Division of the Department of Justice for review (A. 283-86, 297-302; Defendant's Exhibit B-4, at 36-37). Since that time the NCAA has refined but not altered the basic principles of the plans: network packages with limited appearances by each university on the network and limited exception telecasts. The number of annual network exposures has increased from 12 in 1952 to 47 or more under the contracts now in force (A. 154). The number of network appearances per school has increased from one per year in 1952 to six over any two-year period today (A. 54, 154). The number of networks has increased from one in 1952 to three (ABC, CBS,

and Turner) today. The number of different games shown has increased from 12 in 1952 to 228 in 1982: 106 on the networks and 122 under the exception rules (A. 41-44, 244).

2. Respondents sought injunctive relief from the limits on telecasting contained in the Television Plan and network contracts (A. 1-15). They argued that the Plan and contracts violate the antitrust laws because, among other things, the networks' practice of offering equal payments for every game telecast nationally or regionally was price fixing; the NCAA members' refusal to telecast games other than in accordance with the Plan and contracts and the threat implicit in the NCAA's rules, but never carried out, to expel members that violated the television plan, were boycotts; the NCAA's large role in college football telecasting was monopolization; and at all events the Plan and contracts were unreasonable.

3. After a bench trial the district court agreed with respondents on all issues (Pet. App. 41a-133a). The Plan and contracts are price fixing, the court held, because the contracts specify an aggregate amount of compensation which the networks divide among appearing teams; thus teams receive similar prices even though some games may be more attractive than others. The prices are not what would prevail if games were sold one at a time, the court reasoned, and thus are "fixed" unlawfully (e.g., *id.* at 59a-61a, 64a, 87a). Similarly, the Plan and contracts are unlawful per se as boycotts because the NCAA's members agree not to deal with broadcasters other than through the Plan and contracts, and the NCAA's members agree not to televise games with other members which would violate the Plan (*id.* at 100a-104a).

The district court also held the Plan and contracts unlawful as monopolization under section 2 of the Sherman Act because, in the court's view, the relevant market is college football telecast on Saturday afternoons in the fall, and the NCAA has always controlled this market and imposed unreasonable con-

trols (Pet. App. 105a-125a). For similar reasons, the court held the Plan and contracts a violation of section 1 under the Rule of Reason (*ibid.*).

The injunction entered by the district court declared the Plan and 1982-85 contracts void and barred the NCAA and its officers from making any "other contract of similar kind or nature in the future" (Pet. App. 136a). It also prohibited the NCAA and its officers from interfering with members' sale of television rights or requiring any college to relinquish control of television rights as a condition of membership (*ibid.*).

4. The court of appeals affirmed, but on significantly different grounds (Pet. App. 1a-27a). It rejected the boycott holding (*id.* at 22a-25a), it concluded that the influence of the contract on the allocation of payments among teams is not price fixing if the contract is lawful (*id.* at 7a & n.5, 12a & n.11), and it declined to review the monopolization holding, stating that the holding did not affect the relief (*id.* at 20a n.16). It concluded, however, that the Plan and contracts violate the antitrust laws because they reduce the number of different games shown on television. Universities that would like to contract outside the network arrangements often cannot do so. The court of appeals concluded that this is a reduction of output, unlawful per se (*id.* at 8a-15a).[1]

The court of appeals acknowledged that the NCAA advanced procompetitive justifications for the Plan and contracts. The court of appeals rejected the justifications for two reasons.

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[1] The NCAA argued that respondents, as members of the NCAA seeking a larger market share but endorsing most of the NCAA's controls, do not suffer antitrust injury. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977); *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134, 144-46 (1968) (White, J., concurring); *Schoenkopf* v. *Brown & Williamson Tabacco Co.*, 637 F. 2d 205, 211 (3d Cir. 1980). The court of appeals rejected this contention (Pet. App. 3a-6a). Although we disagree with this holding, we have not presented it as a separate question for review by this Court.

First, it placed on the NCAA "the burden of proving the effectiveness and necessity" of the Plan and the contracts in producing the procompetitive benefits asserted for it (Pet. App. 11a & n.9, 15a). Second, given this allocation of burdens, the court of appeals thought that the NCAA had fallen short: the procompetitive benefits were not so overwhelmingly plain that the reduction in the number of games shown could be excused. It called one effect "not unambiguously procompetitive" (*id.* at 10a), characterized the gains of another as "speculative" (*ibid.*), said that a third could be achieved by "less restrictive means" (*id.* at 11a), and disregarded a fourth altogether (*id.* at 12a-14a). Respondents had argued that the justifications should be rejected for a third reason: nonexistence. The court of appeals did not take this third ground.[2]

The court of appeals went on to record its views on other questions. The court dealt with the Rule of Reason by concluding, first, that the appropriate market is college football shown on Saturday afternoons in the fall (Pet. App. 16a-19a), in which the NCAA possesses a very large share. With market power thus established, the court of appeals held that the Plan and contracts are unreasonable restraints, largely because, once they are signed, there is no further competition among networks for the telecasting of individual games or among schools for rights fees, although the schools compete vigorously for network appearances. The court also expressed concern that the

[2] The NCAA argued in the court of appeals that many of the district court's findings and inferences concerning the procompetitive benefits were clearly erroneous. These arguments were based in part on objections to the allocation of burdens and in part on flaws in the district court's use of economic analysis. The court of appeals rejected the NCAA's arguments on burdens, but it evidently was uncomfortable with the district court's inferences. The court's approach—to assume the existence of competitive benefits but hold them insufficient as a matter of law—allowed it to avoid passing on the factual disputes. See also pages 17-19, 27-33, *infra*.

sale of rights to many games in three network packages creates "vertical foreclosure," reducing participation by smaller networks and TV stations (*id.* at 4a, 14a-17a).

Although it found a violation, the court of appeals concluded that the district court had erred in designing relief. The injunction swept too broadly (Pet. App. 25a-27a), improperly banning the NCAA from taking any role in telecasting. The court thought that the NCAA could limit televising of a college's games as a sanction for violations of other rules, could prohibit telecasting on Friday nights (when high schools play), and could formulate other "less restrictive" plans, including pass-over payments and arrangments that did not entail assertion of exclusive rights to telecasting (*id.* at 21a, 26a-27a). It stated that although "the NCAA cannot lawfully maintain exclusive control of the [telecasting] rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case" (*id.* at 27a). The court did not vacate the injunction, however, but rather affirmed and remanded to the district court to reconsider in light of the views expressed in the opinion (Pet. App. 27a; Pet. App. 137a).[3] This left the injunction in effect, and respondents say that under the court of appeals' disposition the district court properly may order the NCAA "out of the television football business altogether." Response to NCAA's Application for Stay, dated July 19, at 8.

Judge Barrett dissented (Pet. App. 28a-40a). He agreed with the NCAA on every point in dispute and also concluded

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[3] The NCAA believes that this approach is unwarranted. Under controlling cases, including *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976), and *Schmidt* v. *Lessard*, 414 U. S. 473 (1974), an appellate court is required to vacate a vague, overbroad, and unjustified decree, not just to affirm and give advice to the district court. Nonetheless, we have not presented the remedial issues for separate consideration here. Cf. page 33, n.18, *infra*.

that because of the amateur and educational nature of college football, the application of the ordinary approach to antitrust analysis is unwarranted. In particular, Judge Barrett concluded that "the district court failed to adequately focus on the procompetitive features of the NCAA television plan-contracts" (*id.* at 33a), that the Plan and contracts "on balance, promote competition and enhance viewership" (*id.* at 38a), and that the NCAA is "a form of joint venture, and its television plan and contracts are an integral, all-important aspect of its purposes and goals" (*id.* at 39a).

In light of the substantial continuing effects of the injunction and the probability that the NCAA would be successful in obtaining relief from this Court, Justice White issued a stay on July 21, 1983 (Pet. App. 141a-44a).

SUMMARY OF ARGUMENT

The NCAA is a joint venture. Its member colleges' athletic programs are integrated in large part. Such integration is inevitable and beneficial in any sports league. Games are made by the league—by the collectivity of teams—rather than by individual colleges. The cooperative aspects of the NCAA's arrangements enable the NCAA and its members to produce, at lower cost, football games that will be more attractive to viewers and thus more successful in competition with other forms of live and televised entertainment.

Our arguments on the question whether the television arrangements should be characterized as unlawful per se appear in Parts I, II, and III below, while the arguments pertaining to assessment under the Rule of Reason appear in Parts III and IV.

The argument in Part III concerns the question whether the NCAA has market power. It is pertinent to both the per se and the Rule of Reason analysis because most of our arguments about the competitive benefits of the arrangements—the usual foundation for the Rule of Reason rather than per se ana-

lysis—start from the premise that the NCAA is in fact competing against other forms of entertainment. If, as the Tenth Circuit thought, the NCAA's members are not competing against anyone but have cornered the relevant market, the things we characterize as procompetitive features may appear to lack that quality. An understanding of the nature of competition in television thus is an important ingredient in our arguments about competitive benefits. At the same time, however, the nature of the benefits (Part I), and the allocation of the burden of persuasion (Part II), are essential ingredients in the assessment of market power. It is therefore necessary to weave together in the legal assessment what may appear to be disparate strands of argument.

I

The per se rule applies to naked restraints, not cooperative production. When cooperation among co-venturers reduces the costs of production and increases the potential for competition against other economic units, per se condemnation is inappropriate.

The NCAA is not a cartel; it is a joint venture. Cooperation is inevitable in team sports, and the arrangements challenged here make the sport more attractive to spectators and those who watch on TV. Thus they increase competition and output.

One way in which they do this is by spreading TV exposures, which helps more schools to attract good players and thus make more games more exciting on the playing field. This in turn makes them more attractive to viewers in the stands and on TV, a competitive benefit.

A second effect of the arrangements is that the networks can both promote NCAA football as a series (promotion increases competition against other entertainments) and select games at the last minute, so that they will be relatively more attractive than games picked at the beginning of the year,

before the playing strengths and records of the teams are established. The establishment of college football as a network series, rather than a string of local broadcasts, also increases the quality of the camera and broadcast crews covering the games, again making them more competitive against other entertainment.

A third competitive benefit is that, by altering which teams appear on TV in which areas, the arrangements can increase live attendance at games while allowing as many hours of football as possible to be broadcast. The increase in live attendance, recognized by Congress, is both an increase in one form of output and of aid in making the televised games exciting to promote viewership on TV.

II

The court of appeals erred in requiring the NCAA to prove both the quantum of these benefits and the "necessity" of the arrangements in creating them. Case-by-case scrutiny of the benefits of given arrangements is not the per se rule at all, but rather is a bobtailed version of the Rule of Reason. It is defective because it permits condemnation of practices that have neither been placed in the regular per se category of almost-always-deleterious acts nor subjected to the full scrutiny of competitive effects under the Rule of Reason.

Requiring proof of the "necessity" of the arrangements is foreign to this Court's antitrust cases. No one can prove that *any* economic arrangement is necessary in the literal sense, and thus the Tenth Circuit's approach either sends parties off on a hopeless quest or opens the door to standardless judicial assessments of the wisdom of competitive practices.

The choice between per se and Rule of Reason analysis is made by *category* of restraint, not case by case with the defendant under a burden that can never be discharged. The category of restraint at issue here is not so overwhelmingly likely to be anticompetitive that the per se rule is appropriate.

III

The NCAA lacks market power. Although the NCAA makes almost all "college football televised on Saturday afternoons in the fall"—the lower courts' definition of the market—it possesses no power over price. The people who watch the televised games do not buy the games, and thus the fact that they may be addicted to football is unimportant. The pertinent economic transaction is that advertisers buy viewers, and the advertisers do not care what programming attracts the viewers who watch the ads. The NCAA cannot charge advertisers extra, because only a minuscule fraction of network ads appear on NCAA football. The advertisers have perfect substitutes for the viewers who watch college football.

All of the usual indicia of competition are present in the television market. The NCAA receives less than 5% of the network ads of even the heaviest advertisers on its programs. These advertisers have many substitutes. The price of ads on college football has gone up and down with the price of other ads on TV, thus establishing that all ads are substitutes for one another. The price of advertising time on college football has remained constant (relative to other ads) as the NCAA has increased the number of games, and thus the number of ads, shown. This means that the NCAA is a price-taker in a competitive market rather than a cartel with the power to affect price.

In the television market, only an increase in the number of viewers, or the assembly of viewers with attractive demographic characteristics, will enable a producer of a television series to increase price. The high price paid for ads on NCAA football thus shows an expansion of output, success in competition against other programs for viewers, rather than, as the courts below thought, the presence of monopoly power. The Tenth Circuit has turned the NCAA's success in competition against it.

IV

Even if the NCAA has market power, the arrangements are not unlawful under the Rule of Reason. They are the result of competition among networks for television rights. The Tenth Circuit erred in thinking that television contracts extinguish competition. The process of negotiation for contracts *is* competition, and it assures that the NCAA will produce the set of arrangements that consumers value most highly. Antitrust does not require every market to be modeled after an auction house, in which one game after another is put on the block. Many markets are most competitive when products are sold in packages, as the NCAA sells seasons of games. The producers of other television shows also sell their products by the season, rather than episode-by-episode. The packaging of these games is the most competitive way to organize this market.

ARGUMENT

I. THE RULE OF REASON APPLIES TO THESE ARRANGEMENTS BECAUSE THEY HAVE THE POTENTIAL TO INCREASE COMPETITION AGAINST OTHER ENTERTAINMENTS

A. The Per Se Rule does not Apply to Cooperation in the Nature of a Joint Venture

The per se rule in antitrust applies to naked agreements, not to cooperation among people who produce a product and share the risks of their enterprise. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9-10, 19-20 (1979); *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 355-57 (1982). The distinction between naked restraints and cooperative production is the foundation of our position.

The court of appeals, on the other hand, applied the per se rule because the Television Plan and contracts entail cooperation among teams that are rivals on the field and *could* be more rivalrous in selling to TV as well. We submit that an approach focusing on a potential for additional rivalry makes a fundamental error.

Ventures that entail some cooperation between people who would otherwise be rivals are common features of economic life. A partnership that produces two or more television series may insist that the actors in each series not organize their own shows, or use any series' characters, in a way that would compete with any of the producer's works. The partners may confine each actor to a single show. These restraints help the producer to create products that are more successful against shows produced by others. Similarly, any large firm may coordinate the activities of thousands of people who could compete. It is not inevitable that Chevrolet, Buick, and Pontiac are parts of General Motors rather than competitors. In any economic organization there will be some span of activities over which competition is suppressed, so that the organization can compete against other economic organizations. The suppression of competition inside such organizations is beneficial to society precisely because cooperation makes it possible for firms to compete.

The potential competitive benefits of what looks at first instance to be the elimination of competition are the foundation for the Rule of Reason. As the Court recognized in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918), all agreements suppress some competition. If the perspective is sufficiently myopic, any agreement will appear to be "pure restraint." Suppression of some subsequent competition is the very purpose of contracts. This poses rather than answers the hard question for antitrust. The answers will depend, as *Broadcast Music* makes clear, on whether the agreement in question carries with it a potential to increase as well as suppress competition. If it does, the more discriminating Rule of Reason inquiry is called for.

The question is one of characterization, which the Court has addressed many times in recent years.[4] E.g., *Continental*

[4] Two other cases before the Court also involve characterization issues related to this case. *Monsanto Co.* v. *Spray Rite Service Co.*, No. 82-914, cert. granted, Feb. 28, 1983, to review 684 F. 2d 1226

(*Footnote continued on following page.*)

T.V., Inc. v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977); *National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978); *Broadcast Music, supra; Maricopa, supra.* The principle expressed in those cases is that the restrictive aspects of ventures that are generally procompetitive are subject to scrutiny under the Rule of Reason. The cases ask whether the arrangements in question could help one group or economic unit to compete successfully against others. Only if a court first concludes that a given agreement is very unlikely to have competitive benefits will it characterize that agreement as unlawful per se.

The Court has emphasized, for example, the importance of promoting interbrand competition. *Continental T.V., supra.* It emphasized in *Broadcast Music* how a cooperative arrangement could create a desirable product (readily-available music at costs lower than those of individual contracting). The appropriate question from a competitive perspective is whether the arrangements hold out a substantial potential to create *by competition* the economic efficiency that the antitrust laws were designed to promote.[5] If a practice potentially aids competition against other units, then the activities cannot be unlawful per se, and only the strongest evidence should be allowed to support condemnation under the Rule of Reason.

We submit that the Television Plan and contracts aid the NCAA and its members in competing against other purveyors

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(7th Cir. 1982) (decision applying the per se rule to manufacturer's termination of a distributor; characterization issue concerning the definition of price fixing); *Jefferson Parish Hospital District No. 2* v. *Hyde*, No. 82-1031, cert. granted, Mar. 7, 1983, to review 686 F. 2d 286 (5th Cir. 1982) (characterization issue concerning application of per se rule to cooperation of hospital and anesthesiology group in provision of medical services).

[5] We do *not* argue that an arrangement is lawful whenever it is "beneficial" in some abstract sense, or even whenever it increases economic efficiency. The Court rejected such arguments in *Engineers* and *Maricopa*. Our argument is that the NCAA's arrangements *increase competition* and *thereby* increase efficiency. The competition in question, as we emphasize, is competition for viewers (and hence advertisers) on TV, and for viewers in stadiums.

of entertainment. As a logical matter, we should start with an assessment of the market. Many practices are ambiguous; they may assist in competition if employed by one with a small market share, even though they offer no such benefits if employed by dominant aggregations. See pages 33-36, *infra*. Thus characterization may depend on knowing who are the venture's rivals. We return to this issue in Part III below. For now we emphasize the procompetitive nature of the justifications offered in support of the TV Plan and contracts.

B. The NCAA's Arrangements Increase Competition

1. The TV Plan is a Form of Contractual Integration

The NCAA's TV Plan and contracts are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on TV. The cooperation in producing the product makes it more competitive against other TV (and live) attractions.

The court of appeals conceded that the NCAA is a lawful joint venture, that most of the rules governing play, recruiting, amateurism, and so on, are lawful, and that there are plausible procompetitive justifications for the Television Plan itself. Pet. App. 6a-14a. This should be enough to preclude application of the per se rule. This Court has held repeatedly that the per se rule is confined to naked restraints and does not apply to mergers, joint ventures, and other forms of cooperative activity, despite the fact that any joint activity has a potential for anticompetitive consequences. E.g., *Chicago Board of Trade, supra; Broadcast Music, supra,* 441 U. S. at 9-10, 19-22; *Maricopa, supra,* 457 U. S. at 356-57 (1982) (agreement among otherwise-competing physicians to offer complete medical coverage for a fixed fee would be "perfectly proper"). Decisions in many lower courts take the same approach.[6]

[6] These decisions apply the Rule of Reason to joint ventures with limits on competition much more sweeping than the TV Plan and

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In the sort of cartel arrangement condemned by the per se rule, the conspirators get together and agree on price or territories. The agreement ends competition but adds nothing. The conspirators do not assist each other in production; they assume no joint risks; they coordinate nothing. E.g., *Maricopa*.

The TV Plan and contracts are a far cry from such naked restraints. The members of the NCAA cooperate in creating the product from the very start. The NCAA's rules of play and

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contracts. E.g., *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F. 2d 1030, 1050-55 (9th Cir.), cert. denied, 104 S. Ct. 156 (1983) (to ban a joint venture just because it has market splitting devices would be the sort of literalism condemned in *Broadcast Music*). Similarly, a large number of cases apply the Rule of Reason to amateur and professional sports, recognizing that organized sports have beneficial, output-enhancing features, and that it is therefore inappropriate to isolate particular aspects of a sports league for per se condemnation. E.g., *Brenner* v. *World Boxing Council*, 675 F. 2d 445, 454 (2d Cir. 1982) ("courts have been reluctant to subject the cooperative activities of sports organizations to application of the group boycott per se rule") (collecting cases); *Turf Paradise, Inc.* v. *Arizona Downs*, 670 F. 2d 813, 821-14 (9th Cir.), cert. denied, 456 U. S. 1011 (1982) (temporal market allocation by horizontal competitors not unlawful per se); *North American Soccer League* v. *NFL*, 670 F. 2d 1249 (2d Cir.), cert. denied, 103 S. Ct. 499 (1982) (agreement among NFL owners not to participate in other sports ventures must be judged by Rule of Reason); *U. S. Trotting Ass'n* v. *Chicago Downs Ass'n*, 665 F. 2d 781 (7th Cir. 1981) (en banc) (cooperation among rivals in identifying horses' records, and agreement not to race horses under some circumstances, must be judged by Rule of Reason and is lawful); *Gunter Harz Sports, Inc.* v. *United States Tennis Ass'n, Inc.*, 665 F. 2d 222 (8th Cir. 1981); *Hennessey* v. *NCAA*, 564 F. 2d 1136, 1151-54 (5th Cir. 1975) (agreements among NCAA universities must be judged by Rule of Reason); *Neeld* v. *National Hockey League*, 544 F. 2d 1297, 1298-1300 (9th Cir. 1979); *Warner-Amex Cable Communications, Inc.* v. *ABC*, 499 F. Supp. 537, 544-46 (S. D. Ohio 1980) (NCAA's TV Plan and contracts must be judged under Rule of Reason); *Justice* v. *NCAA*, No. 83-522 TUC ACM (D. Ariz. Nov. 17, 1983), slip op. 40-49 (applying Rule of Reason to NCAA's activities; collecting cases).

its rules of competition (such as the number of games, the size of squad, and so on) help to define the product to be made. The NCAA's TV rules create a product (a TV series) furnished to the networks. Each game is a result of cooperation, and the TV series itself a result of extended cooperation. The NCAA's members share the benefits of success and the risks of failure in this common adventure. The NCAA can be thought of as a form of partial, contractual integration, much like a pro sports league. The teams are rivals on the field and have separate "owners" (universities here, entrepreneurs in pro sports), but they cooperate to create the TV series sold to advertisers. Cooperation creates new competition, as we describe below.

2. The Posture of the Case Permits the Court to Consider the Benefits of the TV Plan and Contracts

Respondents have argued that whatever role competitive benefits have in theory, they have none in this case because the district court found against the NCAA on all disputed issues of fact. Both the premise and the conclusion of this argument are incorrect.

Neither the district court nor the court of appeals found that the TV Plan did not produce the benefits we describe in the pages that follow. Each, rather, concluded that whatever benefits were obtainable could be achieved by less restrictive means. For example, with respect to the benefits of the arrangements in making games more hotly contested on the field (and thus watched by more people), the district court said only (a) that the witnesses had not offered a persuasive explanation why the NCAA had to be an exclusive seller for this to occur, and (b) that other, less restrictive methods also could produce balanced games. Pet. App. 70a-71a, 96a-98a, 109a.[7] The court of appeals took the same position, relying on

[7] "It is clear that the NCAA restraints are much more far-reaching than necessary to achieve competitive balance. Moreover,

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the district court's findings. Pet. App. 10a-15a, 21a-22a. The district court and court of appeals took a similar approach to the NCAA's other arguments about procompetitive benefits.[8]

To the extent that either court found the facts adversely to the NCAA, the findings were infected by the placement of the burdens of proof and persuasion on the NCAA. On many issues the NCAA offered the only evidence before the court. The district court rejected the evidence and thus ruled for respondents.[9] Because there was no evidence supporting re-

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the Court concludes that whatever marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy." Pet. App. 109a.

[8] With respect to the utility of the TV Plan and contracts in creating a recognized TV series, facilitating advertising, or promoting competition along similar lines, see Pet. App. 12a-14a (court of appeals holds these justifications "potentially procompetitive"; rather than finding the facts insufficient, court states that justifications must be disregarded because of other considerations), *id.* at 90a-91a (district court rejects these justifications because controls are not "necessary" to yield a series).

With respect to the effects of the Plan and contracts in increasing live attendance, see Pet. App. 10a (court of appeals states that "the record contains some evidence that supports the conclusion the plan enhances live viewership" but concludes that this evidence is too "speculative," chiefly because it does not permit a direct comparison between the increase in live attendance and any reduction in TV viewership); *id.* at 68a-70a (district court finds two empirical studies, each showing effects of TV on attendance, "fallible" and then, without citing evidence for a conclusion of no effect, holds that the Plan permits so much TV broadcasting that preventing adverse effects on attendance could not be its purpose).

[9] The live attendance dispute is a case in point. The only evidence about the effects of TV on live attendance was contained in the studies of the National Opinion Research Center from the 1950s (A. 271-73, 287-91, 326-29, 331-36, 340-46, 349-50, 352-54, 356-59) and a new study by Dr. William M. Landes (A. 178-81, 195-213). Each study showed that increased telecasting reduced live attendance.

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spondents' view, the district court's approach was permissible only if the NCAA had the burden of proof. With a different allocation of burdens, it should have ruled for the NCAA. The district court applied its allocation of burdens to all of its findings; it did not make one set of findings under the per se rule and another for Rule of Reason purposes.

Finally, the NCAA argued in the Tenth Circuit that many of the district court's findings and inferences were clearly erroneous. The court of appeals did not reach these arguments, apparently because it concluded that any errors were irrelevant—for reasons stemming from its treatment of both the structure of per se analysis and its assignment of the burden. We argue *infra* that the Tenth Circuit erred as a matter of law in its assessment of what matters and what doesn't in deciding to apply the per se rule.

For all of these reasons, this Court should conduct the characterization inquiry on the assumption that the NCAA has established all of the justifications it asserts. The lower courts rejected the justifications for a variety of reasons: some they believed to be irrelevant to antitrust, some they thought to be precluded by the assignment of burdens. If this Court agrees with our arguments that the justifications are relevant and that the lower court used the wrong burden, then it should reverse.

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At least five witnesses testified to the same effect from their own experiences (e.g. A. 533-34, 640-41, 644-45, 643-44, 651, 653-54, 656-64, 755; Exhibit 131-B, 82; Exhibit 131-C, 39-44; Tr. 1186). No witness testified to the contrary—although one witness did say that a defensive end majoring in economics once wrote a senior undergraduate thesis concluding that attendance at Illinois State did not diminish when it played its games at times when other games were broadcast (A. 514-16). (The witness did not produce the study or identify the data or methods of analysis used.) In the face of the lopsided evidence, the district court simply concluded that the studies were flawed. Some were old; none had a perfect control group. Having applied to the only evidence a standard more suited to an administrative agency's review of evidence claimed to support the introduction of new drugs than the evaluation of statistical evidence at trials, the court then dismissed this as a subject of concern.

3. The Arrangements Promote On-the-Field Balance, Which Makes College Football More Competitive against Other Entertainments

One reason the Plan and contracts increase competition is that they spread national and regional TV appearances among more teams than would be the case in their absence. The limitation on the number of appearances per team (now six, four of them national, in any two-year period) means that additional teams receive wider exposure. It is undisputed that the extent of television exposure is very important to colleges in recruiting new players and attracting alumni donations. Thus the increase in the number of teams shown on national or regional broadcasts puts the teams on more competitive footing in recruiting new players and financing their programs.

The result is that colleges will be more evenly matched on the playing field, and more games will be close and exciting. The more close and exciting games there are, the more people will watch college football on TV, where it competes with other entertainments. This is the "balance" justification.

The court of appeals called this justification "noneconomic" and dismissed it under the rationale of *Engineers* (Pet. App. 11a). The court said that the justification simply exalts a reduction in competition. We think the court's response reflects a misunderstanding of the argument. The NCAA has never argued that competition should be reduced, or that such a reduction would be beneficial. The argument, rather, is that balance is procompetitive because it increases competition for audiences on TV.

The court of appeals' reaction may stem from the fact that balance would be a preposterous justification for an agreement among true competitors. No one would say that promoting balance between Boeing and Lockheed in the sale of aircraft is an appropriate, procompetitive aim. If a product can be made and sold by a single firm, that firm must compete against others, and the market will decide who wins and loses.

Football, however, entails *both* competition and cooperation. The NCAA is in some respects a single firm, which must coordinate its internal decisions in order to make the best product. Every game has two teams, and the competition on the field must be balanced or the games will not be attractive. Unless there are many, reasonably equal teams available to be matched on TV, the quality of the product furnished to the networks, audience, and advertisers will decline. Competitive, balanced games are the product the NCAA and its members furnish. This is why college football is successful in competition with other forms of entertainment. Without balanced rivalry on the field, output (measured as viewers of games or in any other meaningful way) will decline, as people turn to other sources for entertainment. Balance on the field is procompetitive because it enhances output. Joint action produces balance; teams and colleges cannot do this alone. Cooperation thus increases competition. The increase in competition is why, under the analysis of *Broadcast Music*, a court must apply the Rule of Reason.

The court of appeals asked why teams that compete on the field should not compete to sell games to television as well. It is misleading, though, to focus on playing field rivalry. The playing field rivalry *is the product;* it is not an independent form of competition. Competition on the field is real, but it is not the economic competition protected by antitrust. Games are not like pens or napkins, made by one firm in competition with others. Each game takes two teams; over a season each school plays eleven opponents. Each school must create a schedule of games with comparable opponents. The scheduling entails multiple networks of horizontal cooperation. These horizontal networks produce a product that is sold in economic competition with other forms of entertainment. Cooperation can

improve the product and thus increase competition.[10] Respondents do not make and vend TV games. Games—seasons of games—are made and sold by the collectivity of colleges, by the league.[11] The TV Plan and contracts do not create cooperation; rather they improve preexisting cooperation to make the product more attractive.[12]

4. Cooperation Creates a TV Series and Reduces the Costs of Production, Which Increases Competition

In *Broadcast Music* the Court held two justifications—the creation of a new product of at-the-ready music licenses, and the reduction in the transactions costs of licensing—to be sufficiently procompetitive to call for application of the Rule of Reason. In *Continental T.V.* the Court concluded that a potential reduction in free riding, which increased interbrand competition, also called for application of the Rule of Reason. All three of these justifications apply to the NCAA's arrangements.

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[10] See Carlton & Klamer, *The Need for Coordination Among Firms, With Special Reference to Network Industries*, 50 U. Chi. L. Rev. 446 (1983) (emphasizing the need for careful application of antitrust principles to industries in which some horizontal cooperation is helpful in increasing output).

[11] The few "superpowers" that might emerge in the absence of the NCAA's controls would not produce a menu of games large enough to be attractive. Networks need not just a few competitive teams, but tens of them so that there might be 100 or more balanced games during each season. Skill, even terms, and variety are the foundations for successful competition against other entertainments. Unless the pool of competitive teams is quite large, it will be hard for a station or network to assemble a season-long package with the quality, competitiveness, variety, and traditional rivalries that make for success.

[12] The district court said that the existence of powerhouses showed that the arrangements had failed to produce balance (Pet. App. 98a). This misses our point: television arrangements affect balance at the margin. A reduction from 40 strong teams to 20 or 10 would have a profound effect on the success of college football telecasts against other entertainments.

NCAA football is a television series, promoted by the networks as a series in competition with other entertainment. NCAA football is sold to networks as a package of 28 annual installments (exposures), just as "Dynasty" is sold as a package of 24 installments. The package sale of "Dynasty" makes it possible for a network to promote the series more effectively. If every installment were auctioned off separately, no one would have the right incentive to promote the series, because promotional expenditures of one station would inure to the benefit of others. (This is directly parallel to the free riding on services and advertising recognized in *Continental T.V.*). The package sale also enables the purchaser of "Dynasty" to tailor its content for maximum acceptability to the audience and to maintain a uniform format, again increasing the chance that it will find favor with the audience.

Things are no different for the NCAA series. The package sale of games enables the networks to promote college football, without giving away promotional benefits to other TV stations and colleges that take no part in the promotion but just want a free ride. The package sale enhances the scope of the networks' choice, making it possible to ensure a more consistent quality and to create balance and variety. The networks may choose any game (often not until five or six days before telecasting); they look at each week's performances to pick the games that seem most likely to be exciting. This last-minute selection of exciting games could not easily be arranged in the absence of the NCAA's arrangements, for then games would be sold to TV in advance of the season. The fact that games are held open under the contract also enables the networks to do this last-minute adjusting of schedules with much lower transactions costs, saving resources.

The network games are telecast more widely than local games would be. This could reduce the production cost (expenses of announcers, camera and other personnel) per viewer, if the staffing is held constant. It also could permit the

employment of a larger or better production crew at the same cost per viewer. Either way, network telecasts have lower quality-adjusted costs of production than local telecasts.

For these reasons, the NCAA series has many of the features of the new product justification in *Broadcast Music*: it yields a unique product, different from what any school could create by itself; it permits spur-of-the-moment selection; it reduces the costs of creating the series. All of these are procompetitive justifications.

The court of appeals may well have agreed with this argument. It called the justifications "potentially procompetitive" (Pet. App. 13a). Ordinarily this would be enough to require application of the Rule of Reason. The court of appeals declined even to consider these "potentially procompetitive" justifications, though, because it thought the NCAA's market share so large that on balance the Plan and contracts must be anticompetitive (*id.* at 13a-15a). We discuss at pages 33-36 the relation between market share and competitive justifications. It is enough for now to say that the Tenth Circuit confused per se with Rule of Reason analysis. Its approach of holding justifications irrelevant in light of market power is a bobtailed version of the Rule of Reason, "bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular ... system is an undue competitive restraint." *Broadcast Music, supra,* 441 U. S. at 17 n.27. A court cannot justify ignoring a competitive benefit—as the per se rule requires—just by going halfway through a Rule of Reason analysis. The Tenth Circuit has simply repeated the blunder that led to reversal of the Second Circuit in *Broadcast Music.*

The court of appeals also observed that *Broadcast Music* was different from this case because the horizontal arrangement in *Broadcast Music* allowed composers to sell directly to users of music, while the TV Plan and contracts allow direct sales only under the exception rules (Pet. App. 14a). The district

court took a similar approach (*id.* at 93a). One answer is that colleges can and do sell outside the network TV contracts: there are more exception telecasts than network telecasts. A. 152-56; page 4, *supra*. A second answer is that direct sales would be of concern only if the NCAA dominates a relevant market, as Broadcast Music and ASCAP did. If the NCAA lacks monopoly power, competition from other vendors is sufficient. See Part III, *infra*. The composers' right to sell outside the blanket license in *Broadcast Music* was important only as a source of potential competition. The parties agreed in *Broadcast Music* that CBS would not license music directly so long as it had a blanket license, so that direct licensing would be important only if CBS should drop the blanket license. Here, if the networks drop the NCAA's package deal, each college could sell directly. Here, as in Broadcast Music, the effective choice about whether to buy rights in a package rests with the networks. We return to this in Part IV.

5. The Arrangements Increase Live Attendance

A third procompetitive effect is that the Plan and contracts increase live attendance at games by reducing the conflict between telecasting and live games. If people are interested in football, then the more plentiful the TV offerings, the less likely are these people to attend games. The stay-at-home incentive may be especially powerful when the TV game involves a popular local school.[13] Yet live attendance is the lifeblood of many schools, which rely largely on box office and concession receipts for the support of their football programs. Diversion of fans to TV may undermine college sports at other schools, reducing the effectiveness of competition in the longer run against other kinds of entertainment.

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[13] The district court therefore missed the point when it observed that the NCAA's plan permits as much as nine hours of telecasting on any given Saturday (Pet. App. 69a). The TV Plan and the exception rules are designed to minimize the number of times a telecast of a popular local school's game will empty the stadiums of nearby schools.

The court of appeals conceded that increased attendance is procompetitive as an increase in output. It dismissed the evidence here as too "speculative" (Pet. App. 10a)— principally because the record does not permit a direct comparison between the increase in live attendance fostered by the TV Plan and any reduction in TV audience—but again this confuses the per se inquiry with the Rule of Reason. Once a defendant establishes a competitive benefit, it is necessary to apply the Rule of Reason.

It is far from clear, in any event, that there is any tradeoff between live attendance and TV viewership in the long run. An increase in live attendance helps maintain the aura and excitement created by crowds, which in turn makes football more attractive (as a live rather than studio event) for television viewers, networks, and advertisers. One needs only to think of why TV shows often use canned laughter or other efforts to simulate the presence of an audience in order to appreciate this effect. Thus more live attendance may yield more TV viewership (by new or different viewers) as well. See A. 785; Tr. 768.

The record strongly supports the NCAA's position that telecasts lead to a reduction in live attendance (see notes 8 & 9, *supra*). The gate-enhancement justification also has been used repeatedly by Congress as the basis of legislation for the protection of attendance at high school, college, and professional football. E.g., S. Rep. No. 1087, 87th Cong., 1st Sess. 2 (1961); H. R. Rep. No. 1178, 87th Cong., 1st Sess. 2-3 (1961); S. Rep. No. 93-347, 83d Cong., 1st Sess. 3 (1973); H. R. Rep. No. 93-483, 93d Cong., 1st Sess. 7-8 (1973). It is hardly the sort of thing a court may disregard entirely, as the per se rule requires.

Respondents say (Br. in Opp. 16 n.16) that Congress's actions demonstrate that the NCAA should seek an antitrust exemption rather than defend its conduct under existing law. Respondents misapprehend the purpose for which we cite Congress's decisions. Respondents have maintained through-

out this litigation that as a matter of fact TV controls do not increase live attendance. Congress has found as a matter of fact that TV controls *do* increase live attendance. A court may not properly invoke a per se rule that is based on a factual *assumption* contrary to Congress's express factual findings.

II. AN ANTITRUST DEFENDANT NEED NOT BEAR THE BURDEN OF PERSUADING A COURT THAT ITS ARRANGEMENTS ARE "NECESSARY" TO THE CREATION OF COMPETITIVE BENEFITS

Before adopting the per se approach, the court of appeals surveyed the procompetitive justifications advanced by the NCAA. It applied the per se rule only after discounting these justifications. The court conducted the survey with its thumb on the scale, though: it held that the per se rule applies unless the defendant establishes not only that its conduct is procompetitive in fact but also that the restraints it has chosen are "necessary" to the achievement of these procompetitive results (Pet. App. 11a & n.9, 15a; see also 13a & n.14).[14] The Tenth Circuit applied the per se rule not because the NCAA had failed to advance procompetitive justifications but because it had not convinced the court of their magnitude. (It rejected one, for example, because it was "not unambiguously procompetitive", *id.* at 10a, and it treated others in a similar way).

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[14] Other courts have held consistently that in antitrust litigation the plaintiff has these burdens, which never shift to the defendant. E.g., *Dos Santos* v. *Columbus-Cuneo-Cabrini Medical Center*, 684 F. 2d 1346, 1352 n.10 (7th Cir. 1982); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 694 F. 2d 1132, 1136 (9th Cir. 1982) (plaintiff "is wrong in its assertion that once it had proved the existence of a vertical restraint on trade . . . the burden shifted to [defendant] to prove the restriction reasonable"); *Graphic Products Distributors, Inc.* v. *Itek Corp.*, 717 F. 2d 1560 (11th Cir. 1983).

A. Proof of Benefits Case by Case is Inconsistent with the Structure of a Per Se Rule

The court of appeals applied the per se rule because, in its view, the NCAA had not done "enough" to justify its arrangements. The court laid down a rule under which a defendant must prove, case by case, that procompetitive justifications actually support the arrangement; if the defendant fails in such proof, the practices become unlawful per se.

This approach obliterates the line between per se and Rule of Reason offenses. In deciding whether to apply per se condemnation to a category of conduct, this Court has always looked to the *logical* power of a claim that the conduct is potentially procompetitive. If logic suggests the possible existence of such benefits, then a court cannot say that the conduct is always or almost always anticompetitive—as it must in order to label the category unlawful per se. *Broadcast Music, supra,* 441 U. S. at 9-10, 19-20; *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958).

If logic suggests that some category of conduct may have competitive benefits, it is appropriate to use a Rule of Reason inquiry to search for them. *Broadcast Music, supra; Continental T.V., supra.* The Court applies the Rule of Reason to *all* merger cases, because of the potential benefits of integration; it leaves to Rule of Reason inquiry the detailed assessment of benefit and harm. On the other hand, if logic suggests the implausibility of benefits, it is inappropriate to search, even if by chance benefits exist in a given case. *Maricopa, supra,* 457 U. S. at 342-48.

It might be wise to put an antitrust defendant to the burden of proving justifications (and the necessity of the restraints) if the court first decided that it was dealing with a category of agreements that were always or almost always anticompetitive. The power of the case for condemnation could be overcome only by the most compelling showing. But such a

rationale would have no bearing on this case. The NCAA is not a cartel; the TV Plan and contracts are not naked restraints. The arrangements challenged here have more in common with other sports leagues, with TV producers (such as MTM Productions) that create multiple shows, and with other cooperative ventures, than with the traditional cartel. To say (as the Tenth Circuit did) that the football teams' partial integration by contract is a cartel, and therefore that the defendant must prove the necessity of the contracts, is to beg the central question of the case.

B. No One Can Prove "Necessity," and a Requirement of Such Proof is Equivalent to Absolute Condemnation

Unless a burden allocation scheme is to be other than a mask for automatic condemnation, it must be possible for the defendant to satisfy the obligation. In an antitrust case, no defendant could satisfy the obligation of "proving" the "necessity" of the arrangements. There is too much room for legitimate debate about the effects of any business conduct. When there is room for debate, a requirement of "proof" of "necessity"—another way of stating a "least restrictive alternative" test—is equivalent to automatic condemnation.

No business practice is necessary in the literal sense, and a court can always imagine some "less restrictive" alternative that, in a hypothetical world, achieves "enough" of the benefits without "excessive" costs.[15] The most anyone can say is that a

[15] The court of appeals' only suggestion was that the NCAA might devise some system of pass-over payments for establishing balance among the teams (Pet. App. 21a). It also implied that a television package using nonexclusive rights would be lawful (*id.* at 26a-27a). But these would not work as well as the existing Plan, and they also entail much of the horizontal cooperation that the court thought unlawful per se. Surely the per se rule was not designed for drawing nice distinctions of this sort. Cf. *Broadcast Music, supra*, 441 U. S. at 17 n.27.

restraint is helpful, efficient, cost-reducing, and the like. To require proof of "necessity" is to condemn, period. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois Election Board* v. *Socialist Workers Party*, 440 U. S. 173, 188 (1979) (Blackmun, J., concurring).

It would be hard to prove, even for a firm as tightly integrated as IBM, that the combination of several different computer and office machine businesses under one roof is procompetitive. The benefits of organization, plain enough in gross, are hard to prove up in a courtroom. See R. Bork, *The Antitrust Paradox* 122-29, 133 (1978). It would be harder still to show that any given set of restraints is "necessary" to the achievement of the gains, when many different marketing approaches could be chosen. Other business organizations, such as sports leagues, hospitals, commercial buildings (offices and shopping centers), which could be, and sometimes are, organized without tight corporate ties, almost certainly would fail to meet the court of appeals' test. There is simply no point in having a "test" that no one can satisfy.

C. This Court has Rejected a "Least Restrictive Alternative" Approach to Antitrust Analysis

This Court has rejected "least restrictive alternative" analysis as a method of identifying per se offenses. In *Broadcast Music* the Court applied the Rule of Reason to the blanket license, a substantial amount of horizontal cooperation. It did so because this form of licensing reduced costs and was accompanied by productive integration. On similar reasoning the NCAA is productive integration, which produces a network series to compete against other shows. Perhaps the NCAA's TV Plan is not "necessary," but neither was the blanket license. The court of appeals in *Broadcast Music*, conducting the Rule of Reason analysis on remand, expressly held the blanket license *not* "necessary" to television networks. *CBS* v. *ASCAP*,

620 F. 2d 930, 937-38 (2d Cir. 1980), cert. denied, 450 U. S. 970 (1981) (blanket license not even a restraint because other ways of licensing may be arranged easily).

Similarly, in *Continental T.V.* the Court repudiated an existing per se doctrine and substituted a Rule of Reason analysis, even though it acknowledged that the restraint "was neither the least nor the most restrictive provision" that could have been used. 433 U. S. at 58 n.29. See also the decision on remand, *Continental T.V., supra*, 694 F. 2d at 1138 n.11, expressly rejecting least restrictive alternative analysis. The list of antitrust cases in which this Court has assigned the burden to the plaintiff could be extended indefinitely.[16]

In other parts of the law it is settled that the plaintiff has the burden even when the law creates or shifts a presumption against the defendant. Title VII of the 1964 Civil Rights Act, 42 U. S. C. § 2000e (1976), offers an illustration of such burden shifting. Once the plaintiff makes out a prima facie case, the defendant must articulate proper justifications. Then the burden returns to plaintiff. *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981) (discussing earlier cases); *U. S. Postal Service* v. *Aikens*, 103 S. Ct. 1478 (1983) (reversing a court of appeals for using a burden-shifting analysis after a full trial). Application of a similar analysis in antitrust would mean that the NCAA bears no greater burden than the one of introducing evidence and articulating justifications.[17] See also Fed. R. Evid. 301. The NCAA discharged this obligation.

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[16] E.g., *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 622 (1977), holding that even in a tie-in case, within the per se category, the plaintiff has the burden of proving the defendant's market power and negating the possibility that a given tie is harmless because the increase in the price of one component of the package is offset by a reduction in the price of the other.

[17] At least one court of appeals has applied the Title VII approach, in modified form, to antitrust. See *Graphic Products Distributors, Inc.* v. *Itek Corp., supra*, 717 F. 2d at 1573 (plaintiff must

(*Footnote continued on following page.*)

D. The Burden Question Affects the Whole Case

If the Court agrees with this submission on the allocation of burdens, it should reverse the entire judgment, not just disapprove the portion of the reasoning that rested on the per se rule. The district court's findings of fact do not distinguish between the per se and Rule of Reason inquiries. All of that court's conclusions apparently were based on the assumption that plaintiffs had no burden, while the NCAA was required to prove the benefits of its arrangements. See notes 8 & 9, *supra*.

The court of appeals was more careful in stating (Pet. App. 11a & n.9, 15a) that it applied a special burden only to the per se aspect of the case. Nonetheless, the Tenth Circuit's decision rested on the district court's findings, which were themselves thoroughly influenced by the mistaken allocation of burdens. The NCAA argued that many findings were clearly erroneous. Because of its assumptions on the location and magnitude of the burden, the court of appeals never addressed these contentions. The court needs to revisit them using the correct burden.

It is also difficult to resist the conclusion that the Tenth Circuit imposed the burden on the NCAA throughout the case, no matter what it said it was doing. The Rule of Reason portions of the opinion (Pet. App. 15a-22a) consist of little more than a reassertion of each of its adverse conclusions from the per se sections. The court did not distinguish in any respect according to any difference in the burden. It is therefore appropriate to vacate the Rule of Reason portion of the

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(Footnote continued from preceding page.)

show the defendant's market power and the existence of anticompetitive effects; defendant then is free to establish that, "notwithstanding its market power, the vertical restraints were reasonably necessary to achieve legitimate, pro-competitive purposes"). (In context, "reasonably necessary" is a much weaker test than the Tenth Circuit's "necessity" test; we read "reasonably necessary" in *Graphic Products* as equivalent to "helpful" or "beneficial.")

judgment along with the per se portion and to remand the case with instructions to the court of appeals to evaluate all of the findings of fact under the correct burden. See, e.g., *U.S. Postal Service* v. *Aikens, supra,* among many cases handling judgments in this fashion.[18]

III. THE NCAA DOES NOT POSSESS MARKET POWER

The cornerstone of the court of appeals' Rule of Reason holding is its conclusion that there is a market in college football televised live on Saturday afternoons in the fall. The NCAA's members have a high share of this market, from which the court of appeals inferred market power. The market power in turn made the restraints unreasonable. The definition of the market rested on essentially two propositions: (1) for many viewers, there is no substitute for college football and thus networks must show college football, and (2) advertisers pay more, per viewer, to reach these viewers than they pay for television viewers on average. Although we do not dispute these findings by the lower courts, we submit that the inference of market power does not follow.

A. The Existence of Market Power is Important for the Per Se Inquiry as well as Rule of Reason Analysis

Market power affects both the Rule of Reason and the per se holdings. The relation between Rule of Reason and market power is plain: unless the NCAA has market power, its arrangements cannot have an adverse effect on prices or output

[18] The difference between per se and Rule of Reason liability also affects the scope of relief, and this provides an additional reason for remand. A per se holding dooms all "exclusive" contracts (and maybe, if respondents are right, all other methods by which the NCAA may package sports TV rights). See Pet. App. 135a-136a. A properly drawn decree based on a Rule of Reason holding, though, would do no more than strike down the existing Plan and contracts, leaving new arrangements to new litigation on a new record.

and thus cannot violate the Rule of Reason. A finding of no market power is dispositive in the NCAA's favor.[19]

The relation between market power and the per se holding is more subtle. Whether a practice may be justified as useful in competing against other economic units depends on whether there is such competition. In other words, the appropriate characterization of a practice as competitive (subject to Rule of Reason) or monopolistic must start from an assessment of its utility as part of a process of rivalry.

Consider the Tenth Circuit's treatment of the argument that the TV Plan and contracts defined and improved a TV series, the better to compete against other entertainment (pages 22-25, *supra*). The Court refused even to consider this justification because, in its view, the inability of the NCAA's members to sell directly to TV networks, outside the series contract, presented unacceptable risks of cartelization (Pet. App. 12a-14a). Such risks are present, though, only if the NCAA's members are so large in relation to the market that the withholding of games affects prices. If the NCAA is small in relation to the market, its activities in packaging a competitive series are consistent with antitrust aims. The characterization analysis required by *Broadcast Music* thus must start (although it cannot end, as that case shows) with an assessment of market power.

The relation between market power and the legality of horizontal cooperation is well established in the law of mergers. Acquisitions that are small compared with the market, or otherwise entail no substantial increase in market power, are

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[19] E.g., *Cowley* v. *Braden Indus., Inc.*, 613 F. 2d 751, 755 (9th Cir. 1980); *Muenster Butane, Inc.* v. *Stewart Co.*, 651 F. 2d 292, 298 (5th Cir. 1981); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F. 2d 742, 745 (7th Cir. 1982) (Posner, J.); *Products Liability Ins. Agency, Inc.* v. *Crum & Forster Ins. Cos.*, 682 F. 2d 660, 663-65 (7th Cir. 1982) (Posner, J.); *Graphic Products Distributors, Inc.*, *supra*, 717 F. 2d at 1568-71 (collecting authorities).

lawful because of the potential benefits that flow from cooperative production of goods and services. Joint ventures also are easier to sustain when they do not create or exploit market power.

The same approach should apply to partial integration by contract, the subject of this case.[20] It would make no sense to hold unlawful per se an agreement among members of the Big Eight Conference to establish a "Big Eight Game of the Week" in basketball. The Big Eight has such an arrangement, under which members sell the games as a package to a single network, split the television appearances and rights fees equally, and agree not to show games in competition with those selected for telecasting in the series. The Big Eight series faces ample competition from other entertainment, and the series package may well be the most effective form of competition against these rivals. Almost every successful professional sport has pooled and sold TV rights as a package to one or more networks, assuring the purchaser of a degree of exclusivity to enable it to promote the series.[21] Yet the Tenth Circuit's approach to the per se analysis would condemn the Big Eight's and the other leagues' arrangements because horizontal rivals

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[20] We do not doubt, on the other hand, that the per se rule applies to naked restraints, no matter how small the market shares of the participants. E.g., *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) (agreement among beer wholesalers in Fresno, California, held unlawful per se); *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305, 309-10 (1956); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940).

[21] Professional football, baseball, basketball, and hockey have a statutory antitrust exemption for telecasting agreements, 15 U.S.C. § 1291 (1976), but this applies only if certain conditions are satisfied, and it does not pertain to other professional sports or any amateur sports. The exemption does not expressly cover sharing of revenues or cable arrangements, and some forms of pooling of rights are not covered.

(the colleges and universities) cooperated in a way that reduced the number of different games shown.[22]

B. Market Definition is a Way of Assessing Market Power

The antitrust laws are designed to root out anticompetitive practices, those that threaten consumers' welfare and economic efficiency. *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 343 (1979). No cooperative production can threaten competition and consumers' welfare unless those who participate possess market power—that is, "the power to control prices or exclude competition." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U. S. 377, 391 (1956). The ideal way to assess market power is to measure it directly. If we know whether a firm (or association) possesses the power to raise prices significantly above the competitive level without losing so much business that it is forced to rescind the increase, we know whether it has the market power with which antitrust is concerned.

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[22] An agreement among professional golfers to telecast selected tournaments and not others as part of a PGA series also would be unlawful per se if market power is to be disregarded. An agreement among a city's sports teams to form a telecasting service for their games could not easily be sustained. The Chicago White Sox (baseball), Bulls (basketball), Sting (soccer), and Black Hawks (hockey) have formed SportsVision, a pay TV service that carries their games. Although SportsVision broadcasts more games than had previously been carried on free TV, the number of free TV games is down, as the teams have agreed not to telecast games in competition with SportsVision. This could be characterized as an illegal reduction of output under the Tenth Circuit's approach. A similar arrangement in Minneapolis between the Minnesota Twins (baseball) and Minneapolis North Stars (hockey) has been challenged by a television station that bid unsuccessfully for a contract to carry the games. *Midwest Communications, Inc.* v. *Minnesota Twins, Inc.*, Civ. 3-82-1729 (D. Minn. Sept. 13, 1983) (holding arrangement unlawful as a tie-in).

When it is not possible to assess market power directly, it is necessary to define a market and to ascertain the parties' shares of that market. A substantial share is a basis for inferring market power. Because the market definition—market share approach is just a *proxy* for what we really want to know, however, the market definition inquiry must be carried on with sensitivity to the underlying concern for power over price.[23] So, for example, in *United States* v. *General Dynamics Co.*, 415 U.S. 486 (1974), the Court defined the market as uncommitted reserves of coal available for sale in the future. This future-oriented definition more accurately reflected power over price than did a definition looking at current sales, most of which occurred under existing contracts that had been negotiated beforehand and could no longer be influenced by a merger. In *Du Pont* the Court defined the market as flexible wrappings rather than just cellophane, because the price of cellophane was constrained by the availability of other wrappings. The list of similar cases is quite lengthy, but there is little need for extended citation.

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[23] See, e.g., II P. Areeda & D. Turner, *Antitrust Law* ¶ 500, 517-28 (1978) (pointing out that markets are defined to assess power, and in ¶500 that because of the status of market definition as a proxy for power, "market definition may not be necessary for proof of market power; may not be sufficient, as such, to establish market power; and may be redundant or misleading once the facts necessary to accurate definition have been obtained"); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 962-63 (1981) (showing how market definition is a proxy for market power). The 1982 Department of Justice Merger Guidelines, 2 Trade Reg. Rep. ¶4502, also recognize that markets are defined to measure power and that the definition should be crafted in light of this concern.

C. The NCAA Lacks Power Because Advertisers Can Switch

Both the district court and the court of appeals defined a market of college football television programming on Saturday afternoons in the fall because college football is unique. Nothing is quite like it. It has devoted fans. The colleges are unlikely to move games to Sundays because of competition from professional football, which is much more popular. Of programming on Saturday afternoons in the fall, only the baseball playoffs and the World Series are as attractive to viewers or advertisers. Advertisers pay a pretty penny to reach the viewers. We do not dispute these factual premises. The conclusion that they define a market does not follow, however, because none of these things indicates market power.

The most important fact about the sale of televised college football is that viewers do not buy the product. The transaction is more complex. Football attracts viewers; advertisers who buy time on the programs pay the networks according to the number and demographic characteristics of people who watch; networks then pay the NCAA and its members according to how much they collect from advertisers (or, in the case of long term contracts, how much they anticipate collecting). The advertisers are indifferent to the reason why viewers watch; they play off different sources of programming against one another to get the best price per viewer. The fact that some viewers may be addicted to college football—would be willing to pay two or three times as much, were they paying anything— does not matter, when the viewers aren't doing the paying. There is simply no way in which the NCAA, by cutting back the output of games, can induce advertisers to part with an extra nickel. We return to this below.

The court of appeals' approach to market power focuses on what the colleges have to sell rather than on what people buy.[24] Under this approach almost any differentiated product is a market unto itself. Mercedes cars cost more than other cars, on average, and many customers are so enamored of them that for those customers Chevrolets are not good substitutes. IBM computers cost more, on average, than other computers, and many customers want an IBM machine even at a premium. One would conclude on such an analysis that Mercedes cars and IBM computers are markets, which Mercedes and IBM monopolize.

This Court rejected analysis of this sort in *Du Pont*, holding that even a product as distinctive as cellophane is not a separate market if many customers find other products to be substitutes. The existence of some customers (cigarette manufacturers) for which only cellophane would do did not define a market. See also *United States* v. *Continental Can Co.*, 378 U. S. 441 (1964) (bottles and cans are in a single market, even though produced by different machines, because users can and do substitute between the two). Many other courts, following this approach, have held that distinctive products and committed

[24] The district court was more explicit than the Tenth Circuit, stating that it would disregard the role of advertisers in the viewership market because "the focus on this inquiry must be guided by the nature of the specific antitrust injury alleged by the plaintiffs. The plaintiffs' concerns have little to do with which particular advertisers choose to buy commercial time on college football telecasts. . . . The activity which produces injury to the plaintiffs is the NCAA's sale to a particular broadcaster or cablecaster of an exclusive right to televise college football games. That being the source of the injury, the Court's analysis must focus on that transaction. By focusing on that transaction, it becomes clear that college football television is a distinct market" (Pet. App. 73a-74a). This approach has nothing to do with power over price, yet the court of appeals endorsed the market definition so found.

customers do not identify a market.[25] In a case with many features in common with this one, a court held that pay television furnished to apartments was not a market—even though the product is unique and the customers cannot switch—because competitive conditions prevented the defendant from elevating prices for its services. *Satellite Television & Associated Resources, Inc.* v. *Continental Cablevision of Virginia, Inc.*, 714 F. 2d 351, 356 (4th Cir. 1983). Similarly, the appropriate inquiry here is whether the NCAA can elevate prices by reducing the number of different games to be telecast. To answer that question, we must return to the situation on the real buyers: the advertisers.

D. Undisputed Data Establish the Absence of Power over Price

The NCAA's power over price is constrained by the ability of viewers to switch to other entertainments on TV, and more importantly by the ability of advertisers to switch to other TV programs and advertising media if the NCAA tries to raise the price. The fact that for some viewers, perhaps even some advertisers, at some times, only football will do, does not give the NCAA power, any more than the fact that some people can shop for groceries only on Saturday afternoons gives a supermarket power. Those who can (and do) switch will prevent

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[25] E.g., *Calnetics Corp.* v. *Volkswagen of America*, 532 F. 2d 674, 691 (9th Cir.), cert. denied, 429 U. S. 940 (1976); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F. 2d 256, 277-83 (5th Cir. 1978), cert. denied, 440 U. S. 939 (1979); *Kaplan* v. *Burroughs Corp.*, 611 F. 2d 286, 293-95 (9th Cir. 1979), cert. denied, 447 U. S. 924 (1980); *Telex Corp.* v. *IBM Corp.*, 510 F. 2d 894 (10th Cir.), cert. dismissed, 423 U. S. 802 (1975) (peripherals plug-compatible with IBM computers are not a market because IBM computers are not a market); *Reisner* v. *General Motors Corp.*, 511 F. Supp. 1167 (S. D. N. Y. 1981), aff'd on other grounds, 671 F. 2d 91 (2d Cir. 1982); *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801 (N. D. Cal. 1981).

sellers from raising price. If the NCAA tried to raise price, advertisers would switch to other shows or other media.[26]

NCAA football is a trivial fraction of all TV programming (the district court computed it at 0.005%, see Pet. App. 120a), and even if there is something special about sports in general the NCAA's fraction is small (about 7-14% of all fall sports, see A. 174-77). Thus the NCAA has no power over advertisers.[27]

Of course, this statement of the nature of the constraint leaves the question of power unanswered. Perhaps, if NCAA football really attracts some especially good audience—which in the broadcast business means a homogeneous audience, permitting advertisers to target their pitches to select groups—the NCAA would have market power because of the limited number of programs that can create such collections of viewers. It is therefore appropriate to look at available evidence.

The hypothesis that there is something special about the NCAA's viewers that enables it to increase price implies that college football is uniquely attractive to certain advertisers. One can test this by looking for such advertisers. This was done, and the data refute the captive advertiser hypothesis. Even the heaviest advertisers on NCAA football put about 95% of their network ads on other programs, establishing that these advertisers have many substitutes (A. 167-74, 182-94; see also

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[26] Testimony in the record establishes that those who participate in television markets view advertisers as the real buyers (A. 772-74, 777). An economic analysis of the broadcast market appears in the report of Dr. William M. Landes, who appeared as an economic expert (A. 158-177).

[27] Indeed, the NCAA's share is not large even if measured from the viewers' perspective in a "Saturday afternoon market." Of all television sets in the U.S., only about 12% tune in to NCAA telecasts; of all sets tuned on on Saturday afternoons, only about 33% are tuned to the NCAA. A. 236-40, 254-55, 781. This is not a large share, even on an incredibly narrow definition.

Pet. App. 119a, crediting the evidence). This holds true whether the inquiry is advertiser-by-advertiser or product-by-product. There are *no* advertisers capable of being exploited by the NCAA.[28]

The court of appeals bypassed this fact, apparently because it believed that the high price paid per viewer, and per game, demonstrates the NCAA's possession of market power (Pet. App. 18a-19a). The court observed that in 1980 a 30-second spot on NCAA football cost $47,900, while a 30-second spot on baseball cost $17,100. *Ibid.* Although we do not dispute the facts emphasized by the court, we submit that the court's inference of market power is simply illogical. The court neglected the relation between output (number of viewers) and the price of ads.

In a perfectly competitive market, the price paid for an advertising spot will depend on two things: the number of people who watch any given show, and the demographic characteristics of those people (A. 158-61). A show that attracts 20 million people will be able to charge roughly twice what a show that attracts 10 million charges; a show appealing

[28] The district court pointed out (Pet. App. 119a-120a) that the heaviest advertisers on college football put 5% of their ads on what amounts to 0.005% of all available programming. It inferred market power from the disproportion. This is an unsupportable inference. No matter what the disproportion, the fact remains that the NCAA gets only 5% of the network business of the advertisers who most want to reach audiences with demographic characteristics like the NCAA's audiences. As a matter of law, a five percent share is too small to support an inference of market power. E.g., *Fortner II, supra; Dimmitt Agri Indus., Inc.* v. *CPC International Inc.*, 679 F. 2d 516 (5th Cir. 1982), cert. denied, 103 S. Ct. 1770 (1983) (25% share insufficient as a matter of law); *Kingsport Motors, Inc.* v. *Chrysler Motors Corp.*, 644 F. 2d 566, 571 (6th Cir. 1981) (firm with at least a 10% share of the concentrated mid-sized car market lacks market power); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) (33% certainly too small).

to higher-income viewers can charge more, because such viewers buy more in response to the ads. The existence of a higher price for the 20-million-viewer show does not establish monopoly. Quite the contrary, it means that the producer of the 20-million-viewer show has found a way to attract a larger audience. This is an increase in output; fostering such increases is the goal of antitrust. Similarly, a producer who figures out how to attract a "better" audience has increased output. The only sound basis for an inference of market power would be a finding that advertisers paid more per viewer, after adjusting for the demographic characteristics of the viewers, on NCAA football.

The court of appeals did not say that advertisers pay more per viewer for NCAA football than they do for viewers of other shows, once the demographic characteristics of the viewers are accounted for. No evidence in the record would support such a conclusion. The evidence just shows that many people watch the NCAA's games, and that these viewers have desirable demographic characteristics. No evidence in the record supports an inference that the NCAA's viewers have unique characteristics unavailable to advertisers on other programs. Many prime time TV shows and other sports events attract much higher advertiser payments per viewer than NCAA football.[29] Apparently many shows yield audiences more attractive to advertisers than the NCAA's. The court of appeals did not say that the networks or advertisers pay more per game

[29] Nielsen data show that in 1980 advertisers paid $4.81 per thousand viewers for 30-second NCAA spots. In the same period advertisers paid $5.05 for professional basketball spots, $5.41 for golf spots, $5.60 for pro football spots, and $7.37 for horse racing spots. Nielsen Television Index, *Sports 1980*, at 65-68 (1981). Prime time shows attracted even higher payments. In July 1983 the price per thousand viewers for 30-second spots on dramas ranged from $4.61 for "Remington Steele" to $11.12 for "Dynasty." The price for adventure series ran from $4.24 for "Knight Rider" to $7.40 for "The Fall Guy." Nielsen Television Index, *NAC Cost Supplement* (July 1983).

than is warranted by the number of people who watch and the amount of advertising sold. Thus the fact that NCAA football brings handsome prices reflects only that NCAA football is attractive to millions of viewers.

Instead of showing market power, this proves our point. The TV Plan and contracts have created popular entertainment, watched by millions. Output (viewers and advertising) is up, not down. The popularity of the games depends in part on the controls at issue in this case, controls that create competitiveness on the field and competition with other products. The court of appeals' observation that the games attract many viewers that advertisers want to reach is a tribute to the procompetitive, output-expanding aspects of the arrangements. It is deeply ironic that the court of appeals should turn the success of the NCAA's plan into a reason for antitrust condemnation.

The district court relied on one more bit of evidence to support its conclusion that the NCAA possesses market power. The court said that the very large increase in the price paid per exposure in the 1982-85 contract establishes power (Pet. App. 77a, 118a-119a, 121a-123a). The court of appeals did not rely on this approach, and for good reason. The premise is untrue, and even if the premise were true the conclusion would not follow. The district court was led astray by looking at nominal dollars, always a mistake in a time of inflation. If one computes all payments in currency of constant value, it turns out that real prices have changed very little over the last 20 years. The price per exposure, measured in 1970 dollars, was $582,300 in 1964 and $576,000 in 1981 (A. 164-66 [Tables are expressed in index numbers which have these values.]; 690-93, 735-37). True, it rose to $853,100 in 1982, but this amounted to catching up on inflation. The price had been $750,500 in 1978, and inflation eroded that price.[30]

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[30] Because the NCAA has entered into a series of multi-year contracts, the payments in the first year (computed in new dollars) *always* show an increase over the payments in the last year of the old contract. Taking an average over the life of the contracts, as Dr. Landes did in the cited portion of his report, and expressing the average in constant dollars, establishes the parity.

It is far better to look at the real price per 1,000 viewers as a measure of price changes over time. This price has not fluctuated much. It was $2.91 in 1974, $2.61 in 1977, and $2.88 in 1980 (A. 163, 236-40, Tr. 1012). It is more important still to observe that the price per advertising spot has remained constant as the number of minutes available on NCAA games has expanded. In competition, no producer's decisions about the size of its own output can affect price by very much; producers are price-takers in competitive markets. When monopolists change the amount of their production, by contrast, they can affect price significantly. The evidence showing that the NCAA is a price-taker very strongly suggests, and perhaps it even proves, that the NCAA lacks power.[31]

At all events, a finding that the price has increased in the latest contract does not support a conclusion of market power. If the NCAA has market power, it has had that power essentially unchanged since 1952. During the interval, it has contracted for telecasting of ever more games. As a firm with market power expands production, price falls; this is a simple application of the law of downward-sloping demand recognized in this Court's cases.[32] The greater the output, the lower

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[31] In a similar vein is undisputed evidence showing that the price of ads on NCAA telecasts has tracked the price of ads on other shows over a long time. Each rises (or falls) with the other. See A. 161-66. The joint movement of prices is a standard signal that two things are in the same market because it shows substitution, as the 1982 Guidelines recognize. See 2 Trade Reg. Rep. ¶ 4502.10(3). (An illustration: if prices of ball point pens and mechanical pencils always move at the same time by the same amount in the same direction, we know consumers are freely substituting between them and they are in the same market, although the facilities for making the two items differ.) Neither of the lower courts mentioned this method of proving the scope of the market.

[32] E.g., *Broadcast Music, supra*, 441 U.S. at 19-20; *Catalano, supra*, 446 U. S. at 648-49 (recognizing the converse of the law: that reduced output and the ensuing higher prices bring new entry). See also Areeda & Turner, *supra*, at ¶ ¶ 402-405 (economics of market power, showing inverse relation between price and output); R. Bork,

(Footnote continued on following page.)

the price. Because the increase in 1982-85 cannot depend on either a new reduction in output or a new agreement in restraint of trade, it must be understood as the result of competition. The NCAA's members collect more money because more games—and more viewers per game—are increases in output. Once the appropriate inferences are drawn from the available evidence, the conclusion that the NCAA lacks market power becomes compelling.

IV. THE TV PLAN AND CONTRACTS PROMOTE RATHER THAN SUPPRESS COMPETITION: THAT THE COMPETITION IS OVER THE SERIES CONTRACT RATHER THAN EACH GAME IS NOT A REASON FOR CONDEMNATION

Underlying most of the court of appeals' reasoning is a conviction that the NCAA's contracts with the networks reduce competition and output because, once the contracts have been signed, the teams and TV stations do not *thereafter* compete, game by game, for telecast rights. E.g., Pet. App. 7a n.5, 14a, 16a-17a, 21a-22a. The court of appeals also objected to the "vertical foreclosure" created by the contracts: they exclude some stations and networks from showing some games, and they supposedly give an advantage to the larger buyers. *Id.* at 4a, 14a-17a. In other words, the court used as a model of competition the existence of a game by game spot market in telecasting rights.

(Footnote continued from preceding page)

The Antitrust Paradox 90-115 (1978) (same); R. Posner, *Antitrust Law: An Economic Perspective* 8-18, 237-55 (1976) (same); F.M. Scherer, *Industrial Market Structure and Economic Performance* 9-44 (2d ed. 1980) (same); Landes report (A. 132-51) (same). The district court's statement that "[o]nce a firm has achieved a monopoly position in an industry, reduced output and raised prices, it maintains its monopoly price by marginally increasing output and prices" (Pet. App. 118a)—a statement that is the foundation for its economic analysis—reflects the most profound ignorance of antitrust economics.

This part of the Tenth Circuit's approach reflects a confusion about the nature of "competition" in antitrust. There is no antitrust reason why competition must take the form of a game-by-game market rather than competition for series contracts. This Court and the courts of appeals have recognized many times that such competition can be as powerful as spot competition in increasing output and improving consumers' welfare.[33] Competition for the contract often is particularly effective because it focuses the efforts of both buyers and sellers on a single, intense round of bidding; the greater stakes of a bulk sale or purchase make the competition that much more intense. The Tenth Circuit's view is the opposite: the use of long term or bulk contracts is a reduction in competition.

In this case there was extensive competition for the network contracts. NBC, ESPN, USA Cable, and many smaller networks competed, while ABC, CBS, and Turner were successful. In light of the nature and vigor of this competition, it is unsupportable for the court of appeals to conclude, as it did, that these very contracts reduce output and increase the price paid for games on TV (Pet. App. 16a-17a, 21a-22a). If the Plan and contracts were the tools of a monopolist, one would

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[33] *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974); *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 623-25 & n.24 (1974); *Fleer Corp.* v. *Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119, 126-27 (7th Cir. 1982).

Respondents dismiss these cases as irrelevant (Br. in Opp. 30 n.32), largely on the ground that one is about coal, another about bubble gum cards, and so on. We do not cite them, however, for the industries concerned. The point is that each case recognizes how the process of negotiating for a long-term contract is a form of competition, rather than a reduction in competition. Similar arguments about the nature of competition have been made by petitioner and the United States as *amicus curiae* in *Jefferson Parish Hospital District No. 2* v. *Hyde*, *supra*.

expect to see ABC, CBS, Turner, and the advertisers as the plaintiffs. On the court of appeals' theory, they pay the overcharge, while respondents are the beneficiaries. Yet ABC appeared as *amicus curiae* to defend the contracts, while CBS and Turner supported the NCAA's request for a stay in the Tenth Circuit. No advertiser has expressed the slightest concern.

The curious litigating posture of the parties in this case—with the supposed recipients of monopoly profits as the plaintiffs, and the supposed victims (the networks) defending the arrangements—suggests that there is a fundamental flaw in the court of appeals' logic.[34] The Court thought competition suppressed; in fact there is more competition. By spreading national and regional TV appearances among more teams, the arrangements promote competitive balance (i.e., help out respondents' rivals); they increase viewership on TV and live attendance at the stadiums of other universities. They produce the efficiencies associated with the packaging of other television series and enable the networks to compete more effectively against other entertainments. They enable TV stations to deliver football at a lower cost per viewer then alternative production arrangements.

Thus even if the NCAA has market power, the TV Plan and contracts are not unreasonable restraints of trade. They expand rather than reduce output. The contracts aid viewers,

[34] There are some curious things in the positions of the courts below as well as in the positions of the parties. The district court and the court of appeals repeatedly condemned the arrangements as monopolistic (price-increasing) reductions in output. The district court also called the arrangements monopsonistic reductions in price (e.g., Pet. App. 62a-74a, 107a-108a). It cannot be both things at once. The colleges get practically the whole price paid by the networks (the NCAA's central organization retains less than 7%). Thus colleges either get more or less; the Plan cannot simultaneously monopolize as the networks see things and monopsonize as the colleges see things.

who watch more football overall but do not watch the same games respondents want to telecast. They also aid the colleges. Like any other form of successful competition, they yield greater output, lower costs, and higher profits. The Plan and contracts make a larger pie, for viewers and universities alike. The profits here signal competitive benefits, not monopoly. True, respondents are not receiving slices as large as they wish, but the antitrust laws do not protect the pocketbooks of individual competitors at the expense of consumers. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 487-89 (1977).

In this market, competition for the contract helps consumers more than spot market competition would. The buyers compete vigorously, and in order to sell contracts to the networks the NCAA must design a set of rules that offers viewers and advertisers what they want. Buyers have so many other options that the competitive contracting process is bound to increase output, to the benefit of all. The antitrust laws do not prefer spot market competition; still less is competition for the contract "unreasonable." Only by narrowing the "market" to the NCAA's product (rather than sports or entertainment on TV), and overlooking how the bidding process occurs, did the court of appeals characterize this output-expanding arrangement as an unlawful restraint of trade. The Plan and contracts pass muster under the Rule of Reason.

CONCLUSION

The judgment of the court of appeals should be reversed.

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December 1, 1983

No. 83-271

In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether an agreement among virtually all producers of commercially salable intercollegiate football to sell football television rights exclusively through a common sales agency may be held unlawful *per se* when it eliminates price competition, restricts output, forecloses small telecasters and advertisers from the market, and restrains trade more than is reasonably necessary to promote the efficiencies of the integration.

2. Whether an antitrust defendant may obtain a rule of reason analysis for otherwise *per se* illegal restraints by asserting that such restraints are ancillary to other purported goals, irrespective of the actual impact of the restraints on competition, without showing the alleged goals are procompetitive or that the restraints are reasonably necessary to the attainment of such goals, and in the face of factual findings that the restraints do not further the goals.

3. Whether the district court's finding, affirmed by the court of appeals, that NCAA has sufficient market power to produce anticompetitive effects through its controls over its members' football television rights is clearly erroneous.

4. Whether a combination by virtually every producer of commercially salable intercollegiate football to sell broadcast rights only as a package, on an exclusive basis, to a limited number of buyers, and restricting the total number of games sold, should be treated as a suppression of competition although the package is sold by a process of competitive bidding.

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No. 83-271

In the
Supreme Court of the United States
OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS

ADDITIONAL STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. §2, provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

STATEMENT OF CASE [1]

1. Although NCAA has permitted all the other sports it regulates to operate in a free television market (D.C., 47a), it has controlled football television since 1953 (D.C., 44a). Through its television restrictions, the NCAA has made itself the exclusive sales agent for television rights to college football games, and has prohib-

[1] The following abbreviations will be used: ("Statement, ¶____") for respondents' Statement of the Case; ("D.C., ____a; 10th, ____a") for references to the opinions of the lower courts in the Appendix to NCAA's Petition for Certiorari; ("Br. in Opp.") for respondents' Brief in Opposition; ("A.____") for references to the Joint Appendix; ("Tr.____") for references to the transcript.

ited individual schools from freely negotiating with television networks or cablecasters outside its own contract (D.C., 93a, 113a; 10th, 14a, 16a-17a). Until 1982, after this action was instituted, NCAA sold the exclusive football television rights for all of its members to a single network; from 1965 to 1981, ABC was that network (D.C., 45a). NCAA entered into contracts beginning in 1982 to sell exclusive television rights to two networks and one cablecaster for a period of three years. These contracts, which will be in effect until 1985, operate in substantially the same manner as NCAA's previous contracts (D.C., 61a).[2] Under NCAA's controls, the contracting network(s) pay a "minimum aggregate fee" (D.C., 57a, 61a; 10th, 2a). Part of this minimum aggregate fee is paid directly to NCAA, and the rest is paid to schools whose teams are televised (D.C., 56a). NCAA, after subtracting the amounts allocated to its championship football telecasts, "recommends"[3] that specific uniform amounts be paid by the contracting network(s) for national and regional telecasts, and NCAA recommendations are always the minimum and maximum amounts actually paid for any individual game (D.C., 56a-57a; 10th, 7a). NCAA also sets the minimum and maximum total number of permitted telecasts and the maximum number of appearances per school, and prohibits the sale of football telecast rights outside the NCAA contract with very limited exceptions (D.C., 58a-64a; 10th, 2a-3a).

2. NCAA membership is essential to an institution "wishing to sponsor a major, well-rounded athletic program," and affects not just football, but virtually all sports (D.C., 53a-54a). This action was precipitated when the College Football Association ("CFA"), consisting of five of the seven major football-playing conferences and virtually all major football-playing independent schools, also mem-

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[2] The record confirms this (A. 487-89; 516-17; 527-28; 613). NCAA's 1982-1985 contracts with two networks "eliminate any possibility of competitive bidding between the networks" (D.C., 62a). "NCAA substantially dictated the terms under which both networks could televise NCAA football. The networks were offered a take-it-or-leave-it proposition" (D.C., 61a).

[3] NCAA began using the word "recommend" rather than "set" in describing its activities regarding rights fees for individual games in 1976, at the direction of its Executive Director (D.C., 78a; A. 393-94). NCAA and its exclusive purchaser have long been aware of these antitrust problems (D.C. 78a, 132a; A. 422-26).

bers of NCAA, attempted to develop an independent television plan with the National Broadcasting Company ("NBC") while NCAA was negotiating its television plan with NBC's competitors (D.C., 49a). NCAA reacted immediately, consolidating its power in 1981 by adopting a bylaw "official interpretation" (later to become the content of the bylaw interpreted) that: "The [NCAA] shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season . . ." (D.C., 49a, 111a). The NCAA publicly threatened CFA members with a myriad of sanctions ranging from reprimand to expulsion, affecting not only their football programs but other sports as well, and stated that it would seek expedited disciplinary procedures against offending CFA schools (D.C., 51a). NCAA suspended its "campaign of veiled threats and coercion" only after the district court ordered it to do so (D.C., 126a). The CFA contract failed, nevertheless, substantially because of the NCAA intimidation of its members that had already occurred (D.C., 51a, 120a; 10th, 22a).[4]

Price-Fixing and Restriction of Output

3. The district court found that NCAA, through its "minimum aggregate fee", has set the "minimum, maximum, and actual price" paid for the telecasting rights of its members' games (D.C., 87a, 113a); that NCAA controls distort the prices which would otherwise be paid in a free market; that the purpose of the controls is to obtain an artificially high price by restricting output and fixing prices (D.C., 79a, 112a); that the "raison d'etre" for the existence of the controls is to restrict competition (D.C., 93a, 114a); that the price paid for telecasting rights "is responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "the controls restrict the number of games shown by local telecasters far below that which would be shown in a free market" (D.C., 114a); and that because of the controls, "many games for which there is a large viewer demand are kept from the viewers, and many games for

[4] This action was originally filed as a class action on behalf of the members of the CFA; NCAA opposed class certification, and when the CFA-NBC contract failed, plaintiffs withdrew their application for class certification on the ground it was no longer needed to protect the interests of the class.

which there is little if any demand are nonetheless televised" (D.C., 115a).

4. The Tenth Circuit held that NCAA has fixed the minimum and maximum total prices for the NCAA television packages (10th, 7a); that the compensation paid by the networks "does not vary from game to game" (10th, 7a); that NCAA's controls consist of "two groups of restraints, those that create an exclusive franchise arrangement with the networks and those that distort the prices paid for the individual games" (10th, 11a-12a); that both the grant of exclusivity and the distortion of prices appear anticompetitive (10th, 12a); and that NCAA controls potentially reduce output of desired products and increase consumption of less desirable products (10th, 10a). The court also noted and relied upon the district court's finding "that without the restraints imposed by the television plan more games would be shown at the local level" (10th, 21a).

5. Both courts considered — and rejected — NCAA's contention that it should not be subjected to *per se* antitrust scrutiny because its restraints had procompetitive justifications and were incident to a joint venture. As to NCAA's argument that athletic competitive balance was promoted by the television restraints, the district court found that "NCAA has failed to show why this competitive balance cannot be maintained without NCAA acting as the exclusive bargaining agent for its members" (D.C., 7a); that NCAA's other extensive regulations over its members were sufficient to maintain athletic balance (D.C., 70a, 97a); that NCAA controls contribute only indirectly, if at all, to this goal (D.C., 110a, 115a); and that the "marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy" (D.C., 109a).

6. The Tenth Circuit, addressing NCAA's athletic competitive balance justification, held that it appeared to be a noneconomic justification which could not justify a restraint on competition (10th, 11a); that the NCAA appeared to be advancing the impermissible argument that economic competition would destroy the market (10th, 11a); that the district court found on adequate evidence that athletic balance could be achieved by less restrictive means (10th, 11a); and that in fact, since the district court found that many more games (particularly local and regional) would be telecast without controls

(D.C., 59a, 66a, 91a, 114a, 118a119a), eliminating the controls would have the effect of equalizing revenues among NCAA members (10th, 21a).

7. As to NCAA's argument that its restraints increased live gate attendance at its members' games, the district court held that NCAA controls have no effect on gate attendance (D.C., 68a, 107a, 115a), and in any event NCAA does not employ its restraints in order to protect gate attendance, but rather to maximize television revenues to its members (D.C., 69a-70a, 108a, 109a). The court held that "the NCAA's argument regarding gate attendance is either an ill-founded belief at best, or at worst, a deception employed to make the majority of the NCAA membership believe that they should control football television out of self interest" (D.C., 70a).

8. The Tenth Circuit, addressing NCAA's argument that its restraints promoted gate attendance and therefore spectator viewership of football games, held that it was doubtful "that the output may be properly characterized as viewership" (10th, 10a); that even if it is assumed viewership is output, total viewership — both live and televised — should be considered, and there was no evidence in the record to permit total viewership to be gauged (10th, 10a); that even if total viewership was enhanced, it did not justify NCAA's restraints because it came at the expense of other options by reducing output of desired products and increasing consumption of less desirable products (10th, 10a); and that the restraints were broader than necessary to achieve NCAA's professed goals (10th, 11a).

9. NCAA also contended that its controls facilitated the marketing of college football television by a system comparable to that approved in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). The district court held that the most important distinction between the *Broadcast Music* arrangement and NCAA's is that NCAA members have been forced to agree by the will of the majority not to contract outside NCAA's television plan (D.C., 93a). It held that "[t]he networks pay the extraordinarily high price they pay for NCAA football because of the guarantee of exclusivity" (D.C., 91a); that NCAA's witnesses were not even able to "articulate any credible reason as to *why* it is necessary for NCAA to act as an exclusive agent with the authority to bind all NCAA members to an exclusive contract" (D.C., 96a; *e.g.*, A. 634-36;

672-76; 752); that "NCAA controls are not necessary for the protection of NCAA's members' right to sell their football games for broadcast" and "many more games would be televised in a free market than are televised under NCAA controls" (D.C., 90a-91a); and that college basketball television is exemplary of the fact that college football will continue to be shown even on the network level without the interference of NCAA (D.C., 76a, 48a).

10. The Tenth Circuit, distinguishing this case from *Broadcast Music*, held that here, "the new and different product . . . comes at the expense of the product that would otherwise be offered by the schools" because the "schools are not permitted to sell outside the network contracts" (10th, 14a); that the contracts restrict the total number of games to be broadcast (10th, 14a); that the NCAA package is sold on an exclusive basis whereas in *Broadcast Music* an unlimited number of blanket licenses were offered for sale (10th, 14a); and that because of the character of the NCAA restraints, "those broadcasters that are unable to bid for the entire package are permanently foreclosed from the market" (10th, 14a).

Group Boycotts

11. The district court found two forms of group boycotts. "First, by granting exclusive rights to certain networks for televising college football, the NCAA essentially agrees not to bargain or make its product available to other broadcasters" (D.C., 67a). "There is an absolute refusal to deal with all of the major competitors of ABC, CBS and TBS" (D.C., 103a). Second, non-members of NCAA cannot appear on television against NCAA members (even outside the NCAA television package), and so "NCAA controls in effect deprive the non-member of the means of producing its final product, a football game" (D.C., 102a, 68a). This forces the non-member to attempt to compete against a monopolist (D.C., 54a).

12. The Tenth Circuit held that NCAA members' agreement between themselves and a few members of the television industry to refuse to deal with the remainder of the television industry did not constitute a group boycott because "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a). The Tenth Circuit held that NCAA members' refusal to appear on television with

non-members was not a group boycott either. The court focused on the NCAA rule as an "expulsion sanction" which appeared "to be an enforcement mechanism and not a sham for an anticompetitive purpose" (10th. 25a).

Rule of Reason

13. Both the district court and court of appeals evaluated NCAA's television controls under the rule of reason, with the observation that doing so would not offend the interest in litigation efficiency in this particular case (D.C., 105a; 10th. 15a). The district court found that "the history and circumstances surrounding the controls lead readily to the inference that they were intended to restrain and enhance prices" (D.C., 107a); that "[t]he controls dictate which broadcasters and cablecasters NCAA members may deal with, and which they may not" (D.C., 113a); that "NCAA has commandeered the rights of its members and sold those rights for a sum certain," making the price paid for their television rights "responsive neither to the relative quality of the teams playing the game nor to viewer preference" (D.C., 113a); that "[f]ewer different teams would appear on the networks, and more games involving more teams would be telecast by local and regional stations, in the absence of the NCAA controls" (D.C., 114a); and that "the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls" (D.C., 115a). The district court concluded that there were no redeeming procompetitive benefits that outweighed these adverse effects on the free market (D.C., 115a).

14. The Tenth Circuit concluded that the NCAA television plan increases concentration in the marketplace, prevents producers from exercising independent pricing and output decisions, precludes broadcasters from purchasing a product for which there are no readily available substitutes, and facilitates cartelization (10th. 22a). The court found that NCAA's assertions of procompetitive benefits "do not overcome the anticompetitive effects of the restraints" (10th. 20a-21a).

15. Both the district court and Tenth Circuit concluded that NCAA had market power over collegiate football television, primari-

ly because of the special suitability of college football to fulfill the needs of networks for Saturday afternoon programming (D.C., 72a; 10th, 19a) and because of the needs of telecasters to reach the demographically unique college football audience — composed substantially of middle-aged male college graduates in the middle to upper income brackets (D.C., 77a, 75a; 10th, 18a). The district court said, particularly, that "[i]t strains credulity to suggest that broadcast programming does not consist of submarkets" (D.C., 76a), and both courts agreed that Saturday afternoon college football television was a relevant market (D.C., 71a-78a; 10th, 18a-19a). Both courts pointed out that Saturday afternoon programming consists largely of sports, cartoons and old movies (D.C., 72a; 10th, 18a); that the most logical substitute for college football, which is professional football, is precluded from televising on Saturday afternoon during the college football season by the strictures of its television antitrust exemption granted by Congress (D.C., 71a, 121a; 10th, 19a); and that other professional sports, *e.g.*, baseball, were not substitutable with NCAA football (D.C., 75a; 10th, 18a-19a). Both courts noted that advertisers spend 2½ times more per viewer to advertise on NCAA football than on the average for other programming (D.C., 75a, 120a; 10th, 18a); and that the unique appeal of college football was indicated by the fact that CBS frequently offered no programming at all, *i.e.*, "went dark", half of each Saturday afternoon in the last few years when ABC had exclusive rights to televise college football (D.C., 72a; 10th, 19a). The district court observed that "ABC was willing to suffer a net loss in televising college football for the benefits it derived from being affiliated with the sport" (D.C., 75a), and the Tenth Circuit held that the networks "need" college football "programming to offer on Saturday afternoon" (10th, 19a). The district court pointed out that ABC and CBS have agreed to dramatic price increases (a 62% increase per exposure from 1981 to 1982, and a 100% increase per exposure from 1981 to 1985) for college football programming in the present contracts (D.C., 122a-123a). The Tenth Circuit held alternatively that even had the district court defined the market too narrowly, the evidence showed that NCAA possessed sufficient market power to make "the risks of cartelization and price enhancement . . . imminent" for purposes of a rule of reason analysis (10th, 20a).

Monopolization

16. The district court found NCAA in violation of §2 of the Sherman Act because it had unlawfully obtained monopoly power in a relevant market (D.C., 124a-125a). NCAA did not argue either in the district court or the court of appeals that, if it had monopoly power (turning on the question of market definition), it had obtained it lawfully (D.C., 124a-125a; 10th, 20a n. 16). The Tenth Circuit, while affirming the district court's market definition (10th, 18a), found it unnecessary to consider the monopolization claim separately because it "would not affect the scope of the relief granted" (10th, 20a n. 16).[5]

SUMMARY OF ARGUMENT

I.

The NCAA television plan is *per se* violative of the Sherman Act because its restraints destroy economic competition among members for the sale of football telecasting rights. These restraints were created and are administered with the openly acknowledged purpose of enhancing the price charged for telecasting rights by limiting the number of games offered for sale. It is not disputed that the television controls additionally foreclose much of the television industry from the market, suppress local and regional telecasts for which there is great demand, and restrict the viewer's choice.

These restraints, in purpose and effect, constitute traditional categories of *per se* illegal conduct. The television plan is an intricate and very efficient multilateral agreement between competitors and a small portion of the television industry, administered with the purpose and effect of fixing prices by restricting output, boycotting all nonassociation members to prevent them from producing competing products, and boycotting a substantial amount of the television industry, all enforced by express and elaborate provisions for disciplining association members who stray from the restraints of the cartel.

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[5] NCAA presents arguments pertaining to standing and remedial issues neither raised nor fairly comprised within its questions presented (Br., ns. 1 and 3). NCAA may not raise additional questions in this manner under Supreme Court Rule 34.1(a), and there is no "plain error" in this case, as the Court has defined that term. *See Silber v. United States*, 370 U.S. 717, 718 (1962). NCAA's contentions are meritless in any event (D.C., 81a-85a; 10th, 3a-6a; D.C. 130a-133a; 10th, 25a-27a).

II.

The establishment of a *per se* violation forecloses the NCAA's attempts to proffer "procompetitive justifications," under any of its various guises.

The NCAA is a cartel, not a joint venture. Its members independently invest in, control, and receive revenues from their football programs, just as they do for their other athletic and academic programs. Where legally separate entities combine with the purpose or effect of restraining competition, they are not joint venturers, but a cartel.

Moreover, NCAA's entire defense in this case, that it destroys competition between its horizontally positioned individual members in order to enhance competition for television time against other forms of entertainment, is foreclosed by this Court's decision in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

Finally, NCAA's purported procompetitive advantages are contrary to the express findings of both lower courts, which NCAA refuses to acknowledge, and contrary to common sense and experience in other sports where television is not regulated — most notably basketball.

Notwithstanding NCAA's interesting but irrelevant observations regarding the allocation of the burden of proof and the distinction between absolute and reasonable necessity, the fact remains that the courts below both flatly rejected the justifications proffered by NCAA, holding that the justifications were not procompetitive, that the restraints were neither effective nor reasonably necessary to achieve the alleged goal, and that in any event the serious anticompetitive effects of NCAA's plan warranted its condemnation.

III.

Both lower courts properly held that NCAA's television plan failed the rule of reason test also. None of NCAA's arguments on rule of reason even resemble a direct challenge to both lower courts' conclusions that the anticompetitive effects of its plan outweigh the procompetitive benefits it claims. NCAA neither denies the existence of the anticompetitive effects, nor addresses the fact or result of the rule of reason balancing tests applied by the lower courts. Rather, NCAA argues that competition by prospective purchasers for the

NCAA's exclusive television package is a satisfactory substitute for the extinguished competition between its member-sellers. However, the Sherman Act has never permitted cartel members to justify the destruction of competition among themselves by reference to competition among buyers to purchase from the cartel.

IV.

Ultimately, every defense urged by NCAA, either in connection with its *per se* or rule of reason analysis, or to escape the district court's monopolization holding, is dependent upon its assumption that it has no market power. This assumption is in turn dependent upon NCAA's premise that the product market should not be determined by examining what NCAA members sell and telecasters purchase, which is telecasting rights, but rather by assessing power of NCAA members over advertisers who purchase commercial time on network telecasts. This premise has no basis in logic or authority, and was properly rejected by both courts and the Justice Department below. If its premise is not accepted, NCAA attempts no answer to the clear findings of the lower courts that the NCAA has market power over the telecasters which purchase its product. The evidence abundantly supports the finding that college football television is a unique product, fulfilling a special need for telecasters, having distinct prices and specialized vendors, and that there is no reasonably interchangeable substitute for it. NCAA has come nowhere near discharging its almost insurmountable burden to prove the lower courts' findings clearly erroneous. Its restraints are therefore illegal.

V.

Because the relevant market was properly defined, the district court's monopolization holding is correct also. Even if NCAA could properly be regarded as a single entity (and it cannot) it would still be a monopolist.

ARGUMENT

Simply put, the issue in this case is whether virtually all of the competing producers of a commercial product may agree to sell exclusively through a common sales agent by an arrangement which has significant anticompetitive effects and is not reasonably necessary to a legitimate integration. The simple answer to this question is

"no": such an arrangement is — and always has been — a violation of the Sherman Act. Neither the issue nor the answer changes simply because the question arises in the context of intercollegiate athletics.

As the courts below both recognized, NCAA has utilized its power in intercollegiate athletic regulation to declare itself, by fiat, the mandatory and exclusive sales agent for the television rights of virtually all of the competing producers of commercially salable college football. In this capacity, NCAA has fixed prices, restricted output, and foreclosed competition in the market. Moreover, it has enforced its controls over the sale of college football television rights with threats of the practical excommunication from all intercollegiate sports. Such practices would be unthinkable in any other context, and they should not be spared here.

The courts below properly recognized that this case has nothing whatever to do with the validity or desirability of NCAA's rules relating to amateurism, rules of play or conditions of competition. Respondents do not challenge NCAA's rule-making powers in these traditional areas of concern. What respondents do challenge is NCAA's venture away from its heritage and into *economic* regulatory functions — a venture which NCAA has seen fit to undertake in only one of the numerous intercollegiate sports which it regulates (D.C., 47a).[6]

The lower courts carefully considered NCAA's attempts to justify its entry into economic regulation on the grounds that it is reasonably necessary to either a rule-making or marketing integration. Stripped of any supporting justifications, NCAA's usurpation

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[6] The distinction between athletic and economic regulation is well stated in *Justice v. NCAA*, No. 83-552 TUC ACM (D. Ariz. Nov. 17, 1983): ("NCAA is now engaged in two distinct types of rule-making activity. One type . . . is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose. [Citing this case]" Slip Op. at 49. "The regulations at issue here, as distinguished from the rules governing television contracts in *Board of Regents of Oklahoma v. NCAA*, 707 F.2d 1147, pertains solely to NCAA's stated goal of preserving ameteurism." Slip Op. at 41. *Hennessey v. NCAA*, 564 F.2d 1136, 1149 n. 14 (5th Cir. 1977). *See also M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 603 (D. Mass. 1983); Ponsoldt, *The Application of Sherman Act Antiboycott Law to Industry Self-Regulation: An Analysis Integrating Nonboycott Sherman Act Principles*, 55 S.Cal.L.Rev. 1, 38-43, 55 (1981). For an economist's testimony discussing the distinction in this case, see Tr. 599-600.

of the exclusive right to sell college football television rights can be judged for what it really is — a naked restraint of trade in violation of the Sherman Act.

I. THE PURPOSE AND EFFECT OF NCAA'S TELEVISION PLAN IS TO RESTRAIN COMPETITION AND ENHANCE PRICES THROUGH EXCLUSIVITY, WHICH CONSTITUTES A *PER SE* VIOLATION OF THE SHERMAN ACT.

The basic tenet of NCAA with respect to football television is that the price received for television rights will be increased if the number of available telecasts of college football games is decreased. The district court found that this restriction of output and enhancement of price were both the purpose and the effect of NCAA's controls (D.C., 79a, 112a).[7] NCAA has sought — and achieved — these anticompetitive effects in the capacity it has established for itself as exclusive sales agent for the football television rights of all of its members.

NCAA has never made any secret of its purpose to enhance prices by restricting output, and indeed proclaimed it openly at trial. NCAA's executive director testified that NCAA had made projections demonstrating that there would be an increase of at least forty-five to fifty percent in football telecasting on Saturday afternoon without television controls (A. 673). He testified further that the purpose of the controls was to restrict the choices of viewers (A. 674), that the exclusivity of NCAA's contracts has "greatly escalated rights fees for colleges" by preventing a saturation or flooding of the market with college football games on Saturday afternoon (A. 676-78), and that NCAA has put a minimum aggregate floor under the prices "so that the network won't grind down the fees paid to those games which have less bargaining power" (A. 670). Similar testimony was given by the chair of NCAA's Football Television Committee (A. 751-52) (networks are willing to pay extra for exclusivity); by a member of NCAA's Executive Committee (A. 756-57) ("It's like anything else, when we got lots of it, the price of it in all

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[7] A civil violation of the Sherman Act is found by proof of either an unlawful purpose or an anticompetitive effect. *See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 44 U.S. 1, 19 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13 (1978).

probability will go down to meet whatever the conditions are."); by NCAA's economist, who flatly admitted that NCAA keeps the price of its football games up by restricting their output (A. 725-28); and by the Senior Vice President of ABC Sports ("The exclusivity is really the essence of our agreement, and has been with the N.C.A.A., and will continue to be") (A. 530). *See also* A. 431-32.

To enforce the exclusivity and output limitations, NCAA has at its disposal the ultimate in sanctioning mechanisms. Not only does it have the power to prohibit television appearances under its plan and to prohibit participation in football bowl games, or, for that matter, in all intercollegiate athletic championship events, but it also has the power to expel a school from the NCAA, which would destroy the viability of that school's athletic program (D.C., 53a-54a; A. 444-45, 549; 486; 510). NCAA has willingly and vigorously threatened the use of these powers, as it did when the College Football Association attempted to implement a competing package of football television rights (Statement, ¶2; A. 435-40, 465-70; 445-46, 449-50; 458-59; 583-86; 631-33; 567-74; 28; 374-77; 379; 380-84).

The lower courts found that the television plan had not only an anticompetitive purpose but also substantial and wide-ranging anticompetitive effects. In the interest of litigation efficiency, the courts analyzed the effects under both the *per se* rule and the rule of reason, and reached the same conclusions under both standards. These findings, which are outlined in paragraphs 3, 4, 11, 13 and 14 of the Statement, *supra*, are fully supported by the record. Both lower courts found and the record shows that the NCAA has fixed the actual price paid for its members' *cumulative* games (D.C., 87a, 113a; 10th, 7a; A 483, 497, 499-500, 524-25, 667-70) as well as *individual* games (D.C., 113a; 10th, 7a; A. 482-83, 578, 665-71, 393-94, 418-21). Plaintiffs' economist, Dr. Ira Horowitz, testified that NCAA's restraints served to raise the price for the television rights sold, restrict output, and restrict the viewer's choice by limiting the games viewers can watch (A. 605-606). Additionally, the restraints substantially reduce opportunities for small or independent telecasters to compete in the market, and for small local and regional companies to advertise on football television, reserving these opportunities for major corporations (A. 609). Another economist, distinguished for his prior studies and writings on intercollegiate athletic

economics and especially the NCAA, concluded that NCAA has fixed prices, reduced output, and is behaving as a typical and very effective cartel (A. 500-510, 513). Similar testimony was given by a third economist (A. 617-19). Witnesses for both plaintiffs and defendant were in firm agreement that without NCAA's exclusivity requirement, many more local and regional telecasts would occur, because of football fans' greater interest in local college teams (A. 548; 583-84; 607-608; 673-74; 783-85). Moreover, restriction of the viewer's choice, by limitation of number and selection of games, is at the heart of NCAA's television controls (A. 605-606, 674, 800), most significant in view of the fact that the antitrust laws are a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).[8]

These actions constitute — both in purpose and effect — classic models of price-fixing by limitation of output and direct price-control, and of enforcement of price-fixing measures by boycott. They are the types of actions which have long been held to fall into well recognized categories of *per se* illegal restraints.

A. *Price-Fixing and Restriction of Output*

Any combination which tampers with price structures is engaged in an unlawful activity, and is subject to condemnation under the *per se* rule. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 346-47 (1982). "[I]nterference with the setting of price by free market forces is unlawful *per se*," *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969), and "[a] horizontal agreement to fix prices is the archetypal example of such a practice." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). Price-fixing agreements "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

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[8] NCAA's exception telecasts have virtually no meliorative impact on this suppression of competition. The exception telecasts are within the control of NCAA's exclusive purchaser, whose affiliated station in the selling schools locality has the first right of refusal for the game (A. 67-68, 98-99). Moreover, the price for such telecasts has consistently been fixed, pursuant to a formula derived from the price of games on the series (Tr. 530-31). Further, exception telecasts are extremely limited in number. For example, in 1981, there were 72 exception telecasts of Division I games (A. 156), most on one or two stations (A. 64-67). In contrast, there were 23 "exposures" on the network series, involving an average of 211 stations each, for a total of more than 4,800 individual station telecasts (A. 238-39).

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951). This is particularly true where, as here, all televised teams receive "the same economic rewards . . . regardless of their skill, their experience, [or] their training." *Maricopa County*, 457 U.S. at 348.

This is not, as NCAA seems to suggest, a case of "literal price-fixing." *Maricopa County*, 457 U.S. at 355. There is nothing merely "literal" about a joint selling arrangement, the purpose and effect of which are to restrict output, enhance price, limit product diversity, and eliminate competition among all of the producers of a product. This is precisely the type of arrangement which traditionally has received *per se* treatment because it "almost always tend[s] to restrict competition and decrease output," *Broadcast Music*, 441 U.S. at 19-20. As to reduction of output, *see also* 1 Von Kalinowsky, *Antitrust Laws and Trade Regulation* §1.03[4][b][ii].

B. *Group Boycotts*

The district court found two forms of *per se* illegal group boycotts (Statement ¶11)[9]. The first type of boycott, that NCAA members have agreed not to bargain or make their product available to any buyers other than those with whom they collectively deal, is a boycott of the variety condemned in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). There, a number of sellers agreed with a single buyer to refuse to deal with the buyers' competitors. The Tenth Circuit discounted respondents' boycott claim on the ground that "the television plan does not constitute an attempt by competitors at one level to foreclose competition by traders at the same level" (10th, 23a), but there was no such attempt by the boycotting sellers in *Klor's*.[10] The *Klor's* type boycott has

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[9] The Tenth Circuit did not uphold the district court's findings of boycotts, but it is well settled that "the prevailing party may defend the judgment on any ground which the law and the record permit that would not expand the relief it has been granted." *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8 (1977).

[10] This is well explained in *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752, 775 (11th Cir. 1983). Any question as to whether NCAA was induced to boycott by one horizontally positioned to those boycotted can be quickly resolved by the district court's finding (D.C., 91a), confirmed by the record (A. 530), that the essence of the agreement is payment for exclusivity. It is not significant that the horizontally positioned beneficiary of the boycott had to bid for the restraint.

been repeatedly recognized in both this and lower court decisions, including sports association cases.[11]

The second type of boycott was found by the district court in NCAA's rule forbidding its members from competing on television with non-members (D.C., 102a, 68a), a rule of obvious utility to a monopolist (D.C., 54a). The rule is not merely a sanction against schools violating NCAA's television plan, but a flat prohibition against dealing with non-members. Such an association rule constitutes an illegal boycott under well settled precedent.[12]

C. *Judicial Inexperience With the NCAA Television Plan Is Irrelevant*

Price-fixing and boycotts constitute traditional categories of *per se* illegal conduct, and NCAA is therefore mistaken in its fundamental premise, that the lower courts applied the *per se* rule to "practices that have [not] been placed in the regular *per se* category . . . ." (Br. at 10.)

The analysis need not change simply because the issue arises in the context of intercollegiate football. The sale of football television

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[11] *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Com-Tel, Inc. v. Du Kane Corp.*, 669 F.2d 404, 412-14 (6th Cir. 1982); *Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371, 365 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478, 484-85 (5th Cir. 1966); *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 601-602 (D. Mass. 1983); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1320-21 (D. Conn. 1977); *Robertson v. NBA*, 389 F.Supp. 867, 893 (S.D.N.Y. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1063-67 (C.D. Cal. 1971), *injunction reinstated sub nom., Haywood v. NBA*, 401 U.S. 1204 (1971). *Supra*, n. 17.

[12] *See Associated Press v. United States*, 326 U.S. 1 (1945) (holding illegal a membership rule forbidding members from selling news to non-members); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (holding illegal boycott by member firms of the New York Stock Exchange of wire connections between members and non-members); *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943) (holding illegal boycott by members of AMA to deprive doctors advocating prepaid health plans of facilities within which to practice). The rule has also been applied to an athletic association. *Blalock v. Ladies Professional Golf Ass'n*, 359 F.Supp. 1260 (N.D. Ga. 1973). *See also* Ponsoldt, *supra* n. 6, at 27-28, 61; Sullivan, *Antitrust* 253 (1977).

rights is — or, but for the NCAA restraints, would be — just as much a competitive commercial enterprise as the sale of medical services in *Maricopa County*. In that case, this Court rejected the argument that the *per se* rule should be abandoned simply because the issue arose in an industry with which the judiciary has had little experience. The Court stated that " '[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.' " 457 U.S. at 349 (quoting from *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940)). As the Court recognized in *Maricopa County*, "judicial inexperience" is relevant only where a *new per se* rule for a particular restraint is being created, not in applying established *per se* rules to particular industries. 457 U.S. at 349, n. 19.

II. THE NCAA'S JUSTIFICATIONS DO NOT ALLOW ITS RESTRAINTS TO ESCAPE *PER SE* CONDEMNATION

It is beyond argument that the myriad of restraints in the television plan stifle competition. As NCAA appears to concede, in a masterpiece of understatement, the effect of the plan "looks at first instance to be the elimination of competition" (Br. at 13). NCAA well understands that it must find some legal justification, cognizable under antitrust analysis, to escape *per se* application of the Sherman Act.

NCAA attempted at trial and is attempting again here to offer a variety of tenuous "procompetitive justifications" for its restraints. These justifications were flatly rejected by both of the courts below on various grounds, including that the restraints were neither effective nor necessary to achieve the asserted goals. These findings are not clearly erroneous and, despite NCAA's attempt to manufacture a new ground for reversal, they would not change if the burden of proof were allocated differently. That should — and, in any other case, would — be the end of the inquiry. Surprisingly, however, NCAA asks this Court to analyze the issues presented here as if "the NCAA has established all of the justifications it asserts" (Br. at 19).

NCAA is mistaken in believing that such an analysis would alter the outcome. Whether or not the allegedly procompetitive justifica-

tions proffered by NCAA are legitimate, they may not be considered in evaluating a naked restraint under the *per se* rule.[13]

NCAA appears to concede that "bare" (i.e., outside the context of its joint venture and integration arguments) procompetitive justifications may not be considered under *Maricopa County*. The Court there held:

> "The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."

457 U.S. at 351.[14]

Nevertheless, NCAA argues that its justifications should be considered on one or both of the following bases:

1. NCAA argues that it is actually a joint venture of the individual schools, as to which *per se* treatment is inappropriate;

2. NCAA argues that it is a contractual marketing integration, and that the restraints in question are procompetitive because they improve the ability of that integration to compete against other television programming and other forms of entertainment.[15]

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[13] NCAA even goes so far as to argue that its escape from *per se* analysis depends upon the absence of market power (Br. at 9, 25 and 34). Market power is irrelevant to *per se* condemnation of NCAA's restraints. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956). This Court went to great lengths to obviate any confusion on this when it adopted the *per se* rule. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 and n. 59 (1940). NCAA's economist expressed fundamental disagreement with this principle, stating that price-fixing "to an economist" means restriction of output in a relevant market, and requires market power (with one exception for unsuccessful attempts to fix prices) (A. 683, 716-17).

[14] *See also, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 & n.59 (1940); *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942).

[15] In the court of appeals, NCAA argued that these restraints also related to its "rulemaking integration" (i.e., that gate attendance and athletic balance should be promoted for their own sake), an argument rejected by that court (App. 9a-11a), and apparently not presented here.

These arguments will be treated in turn.

A. *NCAA Cannot Escape Per Se Scrutiny By Asserting that It Is a Joint Venture*

NCAA asserts that it is a joint venture rather than a cartel, and that its joint venture status automatically exempts it from antitrust *per se* rules. Neither assertion is correct.

First, NCAA football is not the product of a joint venture; although NCAA suggests otherwise, the Tenth Circuit so concluded (10th, 12a n. 13). There is a consensus by courts and scholars alike, both within and outside the antitrust field, of the essential elements of a joint venture. A joint venture requires: (a) a contribution by the parties of capital, property, services or knowledge to a common undertaking; (b) a joint proprietary interest in and right of mutual control over the subject matter of the enterprise; and (c) a joint (not several) sharing of profits and losses.[16]

The members of NCAA have not combined their capital, property, or other assets to operate jointly their football programs; indeed, no school is compelled under NCAA's plan to play football or televise its games at all. Nor do they share a joint proprietary interest in, or a right to mutual control over each other's football programs or telecasting rights.[17] Their profits and losses are not jointly shared, only dependent upon a common variable — the price fixed for telecasting rights through their combined bargaining power.[18] Each school invests in and receives revenues from its football, basketball

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[16] 3 Von Kalinowsky, *Antitrust Laws and Trade Regulation* §17.08[1] at p. 17-99, n. 1; 1 Callmann, *Unfair Competition, Trademarks and Monopolies* §4.37; 2 Williston on Contracts §318A at pp. 563-65 (3d Ed. 1959); 48A C.J.S. *Joint Ventures §§10-16 (1981); Beavers v. West Penn Power Co.*, 436 F.2d 869, 873 (3d Cir. 1971); *Pinkowski v. Coglay*, 347 F.2d 411, 412-13 (7th Cir. 1965), *cert. denied*, 386 U.S. 1036 (1967); *Swann v. Ashton*, 330 F.2d 995, 996-97 (10th Cir. 1964).

[17] 2 Williston Contracts §318A, p. 567 (3d Ed. 1959), quoting from judicial decisions, elaborates: "'The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates in the trust and inducement that each would act for their joint benefit.'"

[18] As stated in *Swann v. Ashton*, 330 F.2d 995, 996-97 (10th Cir. 1964), the chief characteristic of a joint venture is a "joint and not a several profit."

and other sports programs just as in any of its functions — unilaterally. The district court found, and the record supports that the colleges of the nation compete in every aspect of their economic affairs (D.C., 55a; A. 546). They are legally separate entities which, as to their football telecasting rights, have combined to perfect a cartel (A. 507-510, 513; 618-19).[19]

That the NCAA is a lawful association with legitimate non-economic regulatory purposes does not mean that it is entitled to be treated as a single entity when it ventures into the realm of economic regulation. The Maricopa County Medical Society was a lawful association with many laudable purposes and rules. Moreover, it came to court with a bundle of asserted procompetitive justifications for its maximum price limitations. This Court held, however, that the *per se* rule applied, and that it was improper even to consider whether the justifications were plausible. *Arizona v. Maricopa County Medical Society*, quoted at p.19 *supra*. *See also National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978);[20] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 535-536 and n. 4 (1944).[21]

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[19] NCAA relies upon general language in *Maricopa County* and *Broadcast Music* to support its contention that it is a joint venture. In *Maricopa County* this Court held the defendants were "not analogous to partnerships or other joint arrangements in which persons who otherwise would be competitors pool their capital and share the risks of losses as well as the opportunities for profit", and gave the example of a clinic, 457 U.S. at 356-57, which only confirms the accuracy of the definition of a joint venture stated in the text. In *Broadcast Music*, the Court referred to joint ventures and mergers, but did not discuss their elements, and did not hold ASCAP or BMI to be either. 441 U.S. at 23.

[20] *Professional Engineers* is described as a *per se* price-fixing case in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

[21] Pooling agreements affecting price have long been held *per se* illegal. *United States v. Line Material Co.*, 333 U.S. 287 (1948) and claims of procompetitive benefits have been discounted on account of the control such agreements give over prices. *Id.* at 309-310, 315. *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965). *Cf., United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 149 (1948). Associations taking away the freedom of traders to the detriment of competition have also been uniformly condemned. *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

Moreover, even if NCAA could be considered a joint venture in this context, the bald assertion that the *per se* rule is inapplicable to joint ventures is not supportable. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), this Court applied the *per se* rule to horizontal agreements dividing territories among competitors, despite the contention of defendants that they had formed a lawful "joint venture".

> "Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."

Timken, supra, 341 U.S. at 598.[22] Other claims to joint venture status have been rejected by this Court as well as lower courts, where *per se* illegal conduct is involved, over the protests of competitors that the conduct entailed procompetitive benefits. *E.g., United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972);[23] *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969);[24] *United States v. Sealy*, 388 U.S. 350 (1967); *Virginia Excelsior Mills, Inc. v. FTC*, 256 F.2d 538 (4th Cir. 1958); *United States v. Columbia Pictures Industry, Inc.*, 507 F.Supp. 412 (S.D.N.Y. 1980). *See also* Ponsoldt, *supra* n.6, at 55-56. As this Court said in *United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116-117 (1975):

> "The central message of the Sherman Act is that a business entity must find new customers and higher profits

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[22] *Timken* is cited to illustrate horizontal *per se* illegal conduct in *White Motor Co. v. United States*, 372 U.S. 253 (1963), where this Court first used the phrase "naked restraint". The Court in *White* clearly referred to the type of restraint, rather than its purpose or the nature of the organization involved (*id.* at 259-60, 263).

[23] In *Topco* the Court applied the *per se* rule, saying: "In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." 405 U.S. at 610.

[24] In *Citizen Publishing*, this Court affirmed a grant of summary judgment, holding that profit pooling, price-fixing and territorial divisions between competitors under a "joint operating agreement" were *per se* illegal.

through internal expansion — that is, by competing successfully rather than by arranging treaties with its competitors.

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[I]ndependently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel."[25]

B. *The NCAA Television Plan Is Not a Permissible Marketing Arrangement Under Broadcast Music*

1. *This Court's Broadcast Music Analysis*

NCAA next argues that the restraints in its television plan are ancillary to a contractual marketing integration, and that these restraints are supported by plausible procompetitive justifications. On this basis, NCAA concludes that, under *Broadcast Music*, the *per se* rule is inapplicable. Its reliance on *Broadcast Music*, however, is unfounded. *Broadcast Music* did not involve what NCAA requests here — a search for procompetitive benefits of restraints to justify a rule of reason approach to what would otherwise clearly be *per se* violations of the Sherman Act. Rather *Broadcast Music* involved a determination that the integration itself was reasonably necessary in the market, that the restraint in question was reasonably necessary to that integration, and that the restraint had no adverse impact on free price competition in other markets.

In *Broadcast Music*, the Court first noted the *sui generis* aspects of the case — decades of judicial scrutiny, and a necessity for a blanket license to effectuate the Congressional Copyright scheme. Then the Court concluded that the blanket license had neither the

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[25] The lower court cases cited in NCAA's note 6 do not support its contention here. None involve a finding of price-fixing, and even in those where a rule of reason analysis was applied to boycotts, no automatic exemption from *per se* rules for sports associations was recognized. See n. 27, *infra*. Most of the cases carefully distinguish restraints that would be *per se* illegal from the arrangements under scrutiny, and two specifically mention NCAA's television contracts as presenting a different issue. *Hennessey v. NCAA*, 564 F.2d 1136, 1149 n. 14, 1150, 1152 (5th Cir. 1977) (noting that NCAA television contracts and ticket sales are a big business venture subjecting NCAA to the antitrust laws, but holding "this particular restraint [limiting coaching staffs] . . . is not a *per se* violation of the antitrust laws"). *Justice v. NCAA*, No-83-552 TUC ACM (D. Ariz. Nov. 17, 1983) (discussed in n. 6, *supra*). *See* other cases discussed, Br. in Opp. n. 21.

purpose nor effect of threatening the free market economy; that it had created a market where individual composers could not function effectively (as demonstrated by experience); and that there was doubt as to whether the license threatened the central nervous system of the economy, pricing by the free market, because there was no impediment to CBS purchasing compositions individually — it had a "real choice". 441 U.S. at 24.[26]

The Court determined, in parts III B and C of its opinion, that the blanket license was "*reasonably necessary* to effectuate the rights" granted under the Copyright Act, observing that most users of copyrighted works want immediate access to any and all of the repertory of compositions, and that "[a] middleman with a blanket license was an *obvious necessity* if the thousands of individual negotiations, a virtual impossibility, were to be avoided." The Court concluded that "a bulk license of some type is a *necessary consequence* of the integration *necessary* to achieve these efficiencies, and a *necessary consequence* of an aggregate license is that its price must be established." (Emphasis supplied.) 441 U.S. at 19-21.[27]

In parts III D and E of its opinion, the Court made a separate inquiry: determining that the blanket license existed in a market apart from that in which individual composers were competing, and that

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[26] The only market under consideration was that involving BMI, ASCAP, and the three television networks. The thousands of other users of the license were not involved. *Columbia Broadcasting System v. ASCAP*, 620 F.2d 930, 934 and n.6, (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981). In *Buffalo Broadcasting Co. v. ASCAP*, 546 F.Supp. 274 (S.D.N.Y. 1982), the court held that the blanket license was *not* freely chosen from "realistically available marketing alternatives" by local broadcasters, and was therefore illegal as to them.

[27] The *Broadcast Music* approach was used in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 356 n. 33, where this Court distinguished *Broadcast Music*, observing that price setting by doctors was not a "necessary consequence" of prepaid health insurance plans. The same methodology has long been used by lower courts in determining the applicability of *per se* rules, *e.g.*, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (applying least restrictive alternative test to determine whether tying arrangement was unlawful *per se*), and has been applied repeatedly in sports cases, under the rule announced in *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1064-65 (C.D.Cal. 1971), *injunction reinstated sub nom., Haywood v. NBA*, 401 U.S. 1204 (1971). *See M & H Tire Co. v. Hoosier Racing Tire Corp.*, 560 F.Supp. 591, 603 (D.Mass. 1983); *Linseman v. World Hockey Ass'n*, 439 F.Supp. 1315, 1321 (D.Conn. 1977); *Brenner v. World Boxing Council*, 675 F.2d 445, 455 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 76 (1982); *Cf.*,

the composers did not use the blanket license to stifle competition in other markets, *i.e.*, individual sales. The Court stated, after observing the separation of the blanket license from the market for individual compositions: "The individual composers and authors have neither agreed not to sell individually in any other market nor used the blanket license to mask price fixing in such other markets." 441 U.S. at 23-24. Similarly, the Court stated that because "composers have numerous markets and numerous incentives to produce, . . . the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel." 441 U.S. at 22, n. 40.

The Court's approach, then, was to determine the reasonable necessity of the integration to market a new, different product and the reasonable necessity of the price restraint to the integration, and additionally to determine whether the integration permitted more than "literal" price fixing, i.e., whether the integration actually had the purpose or effect of suppressing price competition in other markets.

2. *The Court of Appeals' Broadcast Music Analysis.*

The Tenth Circuit followed precisely the same approach as this Court in *Broadcast Music*, but found that the integration was improper because NCAA's controls had virtually destroyed competition in other markets (10th, 13a-14a). The court observed that in *Broadcast Music* copyright holders retained the right to sell individually, and that an unlimited number of blanket licenses could be sold. The individual sales ensured the presence of potential price competition. The court observed that, in contrast, the NCAA plan came at the expense of the product which would otherwise be offered, since other sales which might provide potential price competition had been essentially eliminated (10th, 13a-14a).[28]

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[27] (Continued)
Gunter Harz Sports, Inc. v. United States Tennis Ass'n, 511 F.Supp. 1103, 1116 (D.Neb. 1981), *aff'd*, 665 F.2d 222 (8th Cir. 1981). A similar approach is advocated by well recognized scholars of antitrust law. Sullivan, *Antitrust* 208-209 (1977) (applying two part test to avoid *per se* rule: (a) price restraint must arise inevitably from the integration; (b) arrangement must not dampen price competition market-wide by ending price competition between participants); Ponsoldt, *supra* n 6, at 40 n. 203 and 59-60.

[28] Even in the insignificant number of telecasts allowed outside the NCAA contract, the price has been fixed by a formula derived from sales under the contract. *See n. 8, supra.*

The court also evaluated the effects of the NCAA's marketing integration (but with a scrutiny not subsuming the rule of reason analysis)[29] and determined that the arrangement was one which would always or almost always restrict competition and decrease output. Moreover, the court found that the exclusive nature of the television plan posed substantial risks of vertical foreclosure. Since none of the features of the *Broadcast Music* arrangement which preserved competition were present, the court concluded that the integration itself was improper.

3. *United States v. Topco.*

NCAA apparently does not dispute the district court's finding that its marketing integration has the purpose and effect of suppressing competition in another market. In fact, it readily acknowledges that the alleged justifications for its restraints — *i.e.*, competitive balance, live attendance and series promotion — are tendered solely for the claim that they tend to make the sport more popular and, therefore, more competitive against other television programming.

Not only is this argument inconsistent with *Broadcast Music*, but it is foreclosed by *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), a case which NCAA has ignored throughout this litigation. In *Topco*, this Court held that *per se* rules were formulated precisely because of the inability of courts to "weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector." *Id.* at 609-610. The Court refused to suspend the operation of the *per se* rule "because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." Id. at 610. The Court held, rather, that defendants had "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Id.* at 610-611.[30] The claim that interbrand competition was promoted by a

[29] The Tenth Circuit quoted this Court's statement in *Broadcast Music*, 441 U.S. at 19, n. 33, that: "'The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, . . . or else we should apply the rule of reason from the start'" (10th, 7a-8a).

[30] Another clear example of NCAA's trading off between different sectors of the economy is its suppression of local and regional telecasts for the benefit of national telecasts.

horizonal combination[31] restricting intrabrand competition was rejected under the *per se* rule. *Id.* at 612.

Topco does not permit NCAA's members to stifle competition among themselves for the sale of television rights, on the hope of increasing competition against third parties, even assuming that college football is in competition with prime-time programming, as NCAA contends. The marketing integration, therefore, is *per se* invalid under both *Topco* and *Broadcast Music*.

4. *NCAA's Procompetitive Justifications.*

Even assuming that NCAA's marketing integration was proper, the television plan would be *per se* illegal because its price and exclusivity restraints are neither effective nor necessary to the achievement of the allegedly procompetitive goals of the integration. *Maricopa County* and *Broadcast Music* clearly establish that application of the *per se* rule can be avoided only by a showing that the restraint is necessary to the attainment of a procompetitive goal. *Maricopa County*, 457 U.S. at 356 n. 33; *Broadcast Music*, 441 U.S. at 19-21.

The courts below carefully considered — and flatly rejected — the justifications proffered by NCAA on the grounds that they were not procompetitive, and that the restraints were not necessary or effective to achieve the alleged goals.

As to competitive balance, the district court held that without NCAA's controls, many more games involving many more schools would have been broadcast, particularly at the local and regional levels (D.C., 59a, 66a, 91a, 114a, 118a-119a). The Tenth Circuit, relying upon this finding, held that "[t]his would have the effect of equalizing revenues" (10th, 21a). The record shows that without NCAA's controls, television appearances would be spread among the smaller schools who presently cannot command national attention, but would command local and regional attention (A. 548; 583-84; 607-608), where the demand is higher (A. 584). This, as the Tenth Circuit observed, would spread revenues, which is NCAA's purported objective. *See also* Statement, paragraphs 5 and 6.

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[31] Such practices by traders holding *vertical* relationships escape *per se* scrutiny under *Continental T.V., Inc. v. GTE Sylvania Inc.*, 422 U.S. 36 (1977), which NCAA mistakenly cites as applicable in this horizontal case.

Similarly, the district court found that NCAA's controls have no effect on gate attendance (D.C., 68a, 107a, 115a), a finding supported by the record (A. 514-16; 582-83; 609-12), and one that the Tenth Circuit noted and did not overturn (10th, 10a, n. 8).[32] The district court further held that NCAA's *purpose* is not to protect gate attendance (D.C., 69a-70a). Moreover, the court of appeals, far from conceding that increased attendance is procompetitive, as NCAA claims (Br. at 26), held that it was "at best competitively neutral" (10th, 10a), because it would promote live attendance by restricting the availability of other options. *See also* Statement, at paragraphs 7 and 8.

NCAA's "series promotion" justification also suffers from fatal defects. The most serious of these flaws is the fact that there is simply no real "series" to promote. The "product" offered by NCAA is not substantially different from the product that could be offered by individual schools in the absence of the NCAA controls (D.C., 89a; 10th, 12a, n. 13).[33] NCAA has no role in the staging, or even scheduling, of football contests. Nor does it offer anything comparable to the blanket license in *Broadcast Music*. In *Broadcast Music*, the blanket license took the place of "thousands of individual negotiations, a virtual impossibility," 441 U.S. at 20, and thus "made a market in which individual composers are inherently unable to compete fully effectively." *Id.* at 22-23. In contrast, it is entirely

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[32] NCAA asserts that the lower courts' findings are inconsistent with legislative history to a congressional antitrust exemption granted to professional sports leagues (Br. at 26-27). Adjudicative facts are judicially noticed only under the prescriptions of Rule 201, Fed. R.Evid. The exemption could have been, but was not extended to college television pooling arrangements. If NCAA desires such an exemption, it must apply to Congress. *Maricopa County, supra*, 457 U.S. at 354-55. NCAA has not yet done so because of its acknowledged belief that Congress would not respond favorably (A. 422-24).

[33] NCAA argues that the contract permits networks to purchase an inventory of games and make a last minute selection before televising. This result does not derive from the exclusivity of the contract, the restraint at the source of NCAA's *per se* violations, and in any event can be achieved by purchasing a first right of refusal from the individual colleges. NCAA also argues its restraints are necessary for sufficient promotion of college football. Assuming the unwarranted premise that only a network has the ability to promote its programming, this is a problem to be resolved by the ingenuity of free competition. Joint promotion efforts in other industries have been very successful, e.g., for milk, beef and franchises.

practical for a telecaster to negotiate with each individual school, and even obtain access to a repertory of games before the season (n. 33). That the schools are able to "compete fully effectively" with NCAA's package is demonstrated by NCAA's express purpose and proclaimed need to suppress such competition. In fact, the only distinguishing features of the NCAA "product" are its exclusivity and its price and output restrictions — the very anticompetitive restraints that are challenged here.

The true purpose of NCAA's restraints is, as its highest officials admitted, to raise prices by restricting output (*supra*, Prop. I); NCAA's claim to other purposes is disingenuous. NCAA's argument really is that it forbids its members from freely dealing in the television market — (a) in order to force the one or two buyers of its television package to eventually telecast the games of less prominent football schools, and (b) to promote gate attendance at less prominent football schools — with the result of equalizing revenues, and thereby the competitive strength of the football programs of its members. But it is obvious, as the Tenth Circuit pointed out, that adequate athletic funding — and thus, the competitive balance which NCAA claims to seek — could be accomplished (assuming it is a proper goal) without doing violence to the marketplace, simply by requiring the televised schools to pay part of their compensation to non-televised schools (10th, 21a).

Finally, NCAA's argument that its exclusive contracts, combined with price-fixing, are necessary to the survival of college football is contrary to experience of other college sports — notably basketball — in the free television market. The district court found the example of college basketball television to be an indicium of the improbability of NCAA's claims of devastation for football television in a free market (D.C., 47a-48a, 76a). The record supports this finding (A. 487, 497-499; Tr. 532-535). In fact, the testimony showed that college basketball has flourished in the free television market. College basketball has not only experienced continuing increases in television exposure, but consequent increases in popularity, revenues, prestige and gate attendance, without the benefit of having an exclusive bargaining agent or limitation on telecasts (A. 498-99).

5. *Burden and Standard of Proof.*

Despite overwhelming contrary evidence and the adverse findings of both lower courts, NCAA continues to tender the same so-called "plausible procompetitive justifications" for its television controls. Realizing, perhaps, that this Court will not simply ignore the factual determinations of the courts below,[34] NCAA has proffered two theories for challenging these findings.

First, NCAA argues that both the district court and the court of appeals improperly placed on it the burden of proving the effectiveness and necessity of its restraints to achieve the efficiencies of the marketing integration. The allocation of the burden of proof is, however, irrelevant in the context of this case. Neither of the lower courts reserved any doubt as to its factual conclusions, rendering any misallocation of the burden of persuasion of no consequence.[35] The NCAA's contention that it offered the only evidence on some issues is both inaccurate and irrelevant. It is inaccurate because respondents

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[34] Where both lower courts concurrently find certain facts, this Court will refuse to review those findings "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). This rule is independent of, and more stringent than the "clearly erroneous" standard, as shown in the Court's cases. *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944); *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 316 U.S. 364, 367 (1942); *Baker v. Schofield*, 243 U.S. 114, 118 (1917).

[35] The allocation of the burden of proof is only important where a court is unable to decide whether a factual proposition is true or false. *E.g.*, McCormick, *Evidence* §336, p. 784 (1972); 9 Wigmore, *Evidence* §2845, pp. 285-87 (1981). Both opinions below are strongly worded denunciations of NCAA's controls, containing numerous and sufficient affirmative findings: (D.C., 69a-70a) (NCAA's controls not intended to protect gate attendance); (D.C., 70a, 110a) (NCAA's noncommercial regulations sufficient for furthering athletic competitive balance); (D.C., 109a) (controls are much more far reaching than necessary to achieve competitive balance, and any contribution to competitive balance "is overwhelmed by the violence which the controls inflict on the free market economy."); (D.C., 112a) (*purpose* of NCAA's controls is to enhance prices by fixing them and restricting output); (10th, 14a-15a) (The television plan suppresses product diversity, restricts output, poses substantial risks of cartelization and vertical foreclosure, distorts prices more than necessary to promote marketing efficiencies, and impermissibly forecloses competition by combination of virtually all actual or potential producers of commercially salable intercollegiate football.)

offered evidence on all disputed issues.[36] It is irrelevant because the NCAA's own witnesses and exhibits supplied ample support for many of the lower courts' findings.[37]

Even if a different allocation of the burden of proof would be dispositive in this case, placement of the burden on NCAA was entirely proper. An antitrust plaintiff, in order to obtain the benefit of the *per se* rule, has the burden of proving that the defendant has engaged in economic conduct of the type traditionally condemned under the rule. On this question, the plaintiff has the burden of persuasion. However, once *per se* illegal conduct is established, the defendant may escape *per se* condemnation only by showing substantial justifications of the kind discussed and found in *Broadcast Music* that make imposition of the *per se* rule improper (an affirmative defense). The burden of persuasion is placed on the defendant only in this latter instance. The sports cases cited in note 27 *supra*, show that this is where the burden has been placed in judicial practice.

NCAA relies upon employment discrimination law to illustrate proper application of the burden of proof in this case. NCAA has, however, chosen the wrong analogy. The case on which NCAA relies, *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), involved a denial that discrimination had taken place at all. The proper analogy is to those cases where *per se* offensive discriminatory conduct is established, but the defendant attempts to justify the proscribed conduct on the basis of a Bona Fide Occupational Qualification ("BFOQ"), which is an affirmative defense. *See*

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[36] In the Brief in Opposition NCAA was challenged to identify disputed issues upon which it offered the only evidence. NCAA cites a single example in its brief, n. 9, asserting that "[t]he only evidence about the effects of TV on live attendance" was offered by NCAA, with one exception which NCAA deprecates for relying on the undergraduate thesis of an athlete. NCAA is mistaken. At least three of respondents' witnesses addressed and countered NCAA's gate attendance argument (A. 514-16, 582-83, 609-612) and additional support for the courts' findings came from cross examination of defendant's own economist (A. 742-45).

[37] The district court reached many of its findings based upon testimony of NCAA witnesses (*e.g.*, D.C., 57a, 73a, 75a, 90a-91a, 120a).

Harriss v. Pan American World Airways, Inc., 649 F.2d 670, 676 (9th Cir. 1980).[38]

NCAA's second challenge to the courts' findings is that both courts improperly required it to prove that its restraints were "necessary." NCAA contends that it is impossible to prove absolute necessity, that the proper test should be "reasonable necessity," and that "reasonable necessity" simply means "helpful" or "beneficial" (Br. at 32, n. 17). Again, NCAA is simply setting up a straw man. Absolute necessity has never been required under antitrust law, and there is no indication in the record that the lower courts applied any such test. In fact, in light of the district court's findings that the restraints were not even effective to produce the alleged goal, there can be no question as to "reasonable necessity."[39] Moreover, NCAA is wrong in asserting that "reasonably necessary" means nothing more than "helpful" or "beneficial." *See* numerous authorities cited in note 27, *supra* and accompanying text discussing and quoting from *Broadcast Music*.

NCAA's challenges to the findings of the lower courts must thus be rejected. The evidence clearly establishes that the restraints in NCAA's television plan are neither reasonably necessary nor effective in achieving any procompetitive goals of the integration. The restraints, therefore, are *per se* violations of the Sherman Act.

III. NCAA'S RESTRAINTS HAVE PROPERLY FAILED RULE OF REASON ANALYSIS

Most of NCAA's efforts are directed toward seeking the rule of reason analysis its plan has already received and failed. Both lower courts identified specifically the anticompetitive effects of NCAA's restraints, considered them in detail, and balanced them against

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[38] *See also Criswell v. Western Air Lines, Inc.*, 709 F.2d 544, 549 (9th Cir. 1983); *Jackson v. Seaboard Coast Line R. Co.*, 678 F.2d 992, 1016 (11th Cir. 1982); *Roberts v. Union Co.*, 487 F.2d 387, 389 (6th Cir. 1973).

[39] Similarly, since the Tenth Circuit found the *marketing integration* "so fraught with anticompetitive potential that it must be considered invalid *per se*", it never reached the question of the reasonable necessity of the restraints. (10th, 13a and n. 14). The court's prior determination as to the burden of proving the effectiveness and necessity of NCAA's restraints (10th, 11a n. 9) was applied only in assessing NCAA's argument that the restraints were ancillary to its *rule-making* integration — an argument abandoned here.

NCAA's alleged procompetitive benefits. The findings of each court are summarized in the Statement, *supra*, in paragraphs 13 and 14.

NCAA's contention that "the burden question affects the whole case" is a desperate attempt to challenge what it recognizes to be unshakable factual findings of the lower courts. Both courts clearly found that respondents satisfied their burden on rule of reason analysis. The district court never held that the burden of proof should be on NCAA; indeed, it made no reference at all to burden of proof. The whole burden of proof issue was first devised by NCAA in the court of appeals, based on phraseology of the district court relating to some of its findings. The Tenth Circuit expressly restricted its holding allocating the burden of proof to NCAA to the same area it found the trial court applied it: the consideration of "whether to apply *per se* or rule of reason analysis to admitted price restraints that the defendant attempts to justify as properly ancillary to a legitimate integration" (10th, 11a n. 9).[40]

As to a rule of reason analysis as such, NCAA contents itself with two brief paragraphs (Br. at 48-49) devoted to reciting alleged benefits dependent on facts contrary to the record and the lower courts' findings (*supra* at 27-29). NCAA does not deny the existence of the serious anticompetitive effects found by the lower courts. Nor does it deny that the lower courts balanced NCAA's purported procompetitive justifications against these effects.[41] Indeed, NCAA's argument is devoid of discussion or analysis undertaking this balancing or challenging that undertaken by the lower courts.

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[40] NCAA's argument that it is "difficult to resist the conclusion that the Tenth Circuit imposed the burden on the NCAA throughout the case, no matter what it said it was doing" (Br. at 32) is a challenge to the integrity and candor of the court of appeals. There is no reason to believe that the Tenth Circuit, while explicitly stating it was applying one standard, secretly applied another. Moreover, rather than proving that the Tenth Circuit imposed the burden of proof on NCAA under the rule of reason standard, the fact that it reached the same findings of fact under both tests suggests that the allocation of the burden was not dispositive in its *per se* analysis.

[41] Such a balancing was undertaken by both courts. Statement, ¶¶ 13, 14. There can be no doubt on this, in view of explicit holdings illustrating this balancing. *E.g.*, "The court concludes that whatever marginal contribution the controls make to preservation of competitive balance is overwhelmed by the violence which the controls inflict on the free market economy" (D.C., 109a).

Instead, NCAA devotes its fourth question presented to the contention that the lower courts erred in failing to see the value of competition for NCAA's package, vis a vis "spot competition" for each of its members' telecasting rights. NCAA misapprehends the nature of the competition which has been suppressed, and which the Sherman Act protects. The competition at issue is competition among *sellers*, not among *buyers* to purchase from a cartel. It is the competition among sellers which NCAA has destroyed by organizing and policing a horizontal exclusive dealing arrangement.[42] Competition among buyers to purchase from a monopolist does not impair the monopoly.

Moreover, nothing in the lower courts' opinions or respondents' contentions challenges the validity of vertical long term contracts like those sustained in the cases NCAA relies upon.[43]

NCAA's only remaining defense on rule of reason is its assertion that the lower courts' conclusions depend on the assumption that NCAA has market power (Br. at 9, 33-34). If the determination of the market was correct, then, NCAA recognizes it has no tenable position as to rule of reason analysis. The converse is not true. The court of appeals observed that even were the market too narrowly drawn, NCAA's total control over college football television, a uniquely attractive commodity from the perspective of broadcasters, compelled a finding of market power sufficient for rule of reason analysis (10th, 20a).

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[42] Indeed, it was the action of NCAA in using its sanctioning power to squelch competition from the CFA's competing package which immediately led to this action.

[43] NCAA claims to have missed our point in distinguishing the cases it cites in its note 33. *See* Br. in Opp. at 30, n. 32. As our parenthetical explanations show, the distinction is between vertical agreements by single sellers and single buyers, and horizontal agreements of sellers (such as vendors of the telecasting rights for college football games), a distinction which continually eludes NCAA in its argument. *Affiliated Capital Corp. v. Houston*, 700 F.2d 226, 236, *reh'g granted*, 714 F.2d 25 (5th Cir. 1983) can be profitably compared to *Omega Satellite Products Co. v. Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982), cited by NCAA in its note 33, to exemplify the distinction. *See also Com-Tel, Inc. v. Du Kane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982).

IV. THE TRIAL COURT PROPERLY DETERMINED THE RELEVANT MARKET

In order to prevail on the market power question, NCAA faces the "almost insurmountable burden" of upsetting the lower courts' findings. *International Boxing Club v. United States*, 358 U.S. 242, 252 (1959).

The circumscription of a relevant market must derive from an inquiry into what "commodities are reasonably interchangeable by consumers for the same purposes." *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 395 (1956). To test for this "reasonable interchangeability", the courts examine a number of factors, which are well summarized in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), and include (1) public recognition of the market as a separate economic entity, (2) the product's peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. Clearly embraced within these criteria are cross elasticity of supply (factors 3 and 7) and cross elasticity of demand (factors 4 and 6).

Cross elasticity of demand was considered in *Du Pont, id.* at 400, and explained as a test for great sensitivity of demand to "slight" fluctuations in price.[44] The question is therefore not, as NCAA casts it, whether once prices are raised high enough, other products will be substituted. "For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612 n. 31 (1953).

Even cross elasticity of demand has been held not a sufficiently narrow test in itself for several reasons. One is that it may "generate more than one broadly defined relevant product market." 3 Von Kalinowski, *Antitrust Laws and Trade Regulation* §18.02[1] p. 18-27, using for illustration *United States v. Continental Can Co.*, 378

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[44] Both courts and economists have emphasized the necessity of assessing substitutability as a function of the most minute price changes. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 742 (1977) (framing proper test as sensitivity to one percent change in price); Sullivan, *Antitrust* 53-55 (1977); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 940 n. 8 (1981). *See also* testimony of Horowitz (A. 593-94).

U.S. 441 (1964), where this Court held glass and metal containers to be in a relevant market while recognizing they constituted *separate* markets also. 378 U.S. at 456.[45] A second reason for looking beyond elasticity of demand is that every monopolist faces an elastic demand at its profit-maximizing output and price, so that there is bound to be some substitution of other products for its own when it is maximizing profits, even if it has great market power.[46] The courts of appeals have steadfastly recognized the necessity for examining the *Brown Shoe* criteria for relevant markets, or "submarkets", in sports as well as other cases.[47] The courts have determined that a relevant market can be found where as few as any three of the *Brown Shoe* tests are satisfied.[48]

Both lower courts considered these factors in detail in determining the relevant market (Statement, ¶15), and their findings are abundantly supported by the testimony of respondents' economists (A. 589-605; 500-503, 510-513).[49] Both lower courts concluded that for telecasters (the buyers), there is no reasonably interchangeable substitute for college football telecasting rights (the product), which is sold exclusively through NCAA's member institutions (the sellers).

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[45] NCAA cites *Continental Can* for the proposition that cans and bottles are in a single market, ignoring the fact that each also comprises a separate market.

[46] The court of appeals recognized this (10th, 19a). *See also* Landes and Posner, *Market Power in Antitrust Cases*, 94 Harv.L.Rev. 937, 961, 977-78 (1981).

[47] *E.g., North American Soccer League v. NFL*, 670 F.2d 1249, 1260 (2d Cir. 1982), *cert. denied*, ___U.S.___, 74 L.Ed.2d 639 (1982); *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1393 (5th Cir. 1983); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1299-1300 (9th Cir. 1982), *cert. denied*, ___U.S.___, 74 L.Ed.2d 400 (1982); *Borden, Inc. v. FTC*, 674 F.2d 498, 509-510 (6th Cir. 1982), *vacated on other grounds*, ___ U.S.___, 77 L.Ed.2d 1298 (1983).

[48] *E.g., Abex Corp. v. FTC*, 420 F.2d 928, 931-32 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 226-27 (D.C. Cir. 1962).

[49] The district court's findings show that it was particularly persuaded by the careful analysis and thorough testimony of Dr. Ira Horowitz (A.589-605). The lower courts emphasized in their analysis the one fact upon which there was a consensus by all witnesses,

NCAA, far from disputing these findings of the lower courts, concedes them (Br. at 38), even to the extent of acknowledging that "networks must show college football" (Br. at 33). Though NCAA never mentions the case, *Brown Shoe*, read together with NCAA's concessions, leaves little if any room for NCAA to dispute that college football television comprises at least a relevant submarket.

The foundation of virtually every argument by which NCAA seeks to escape application of the Sherman Act is its market power analysis, found in Proposition III C, that "The NCAA Lacks Power Because Advertisers Can Switch." All of NCAA's analysis that follows remains dependent upon the proposition that only power over advertisers should be considered, and that the buyers of the product, the telecasters, should be ignored. This proposition is the foundation of NCAA's entire market power argument, yet it stands unsupported by authority, contrary to the evidence, and rejected by both lower courts.

The court of appeals, the district court, the Justice Department, and the respondents have all consistently analyzed the market question in terms of the needs of telecasters, who are the buyers of college football telecasting rights. NCAA insists that we must disregard entirely the transaction between the buyers and sellers of football television rights, and look down the chain to a transaction involving a remote buyer and a derived product, commercial time. NCAA does not cite a single example from the annals of antitrust jurisprudence where a court or commentator has suggested disregarding the immediate buyers, in favor of ascertaining a seller's market power over remote buyers of a product, even where the product is identical to that originally sold. Here, of course, the product is very different. NCAA sells only telecasting rights to football games. The telecaster who purchases the rights invests substantial human and technological resources to create a television program, so it can sell a different product (commercial time) to advertisers.

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[49] (Continued)

i.e., that the audience attracted to college football games (vis a vis other sports and non-sports entertainment) have unique and very desirable demographic characteristics (D.C., 77a, 75a, 10th, 18a; A. 582, 601-605, 730, 732, 777-78; Tr. 357-62, 516-18, 520). Even NCAA's economist acknowledged that a program supplier that expands or improves the demographic characteristics of the audience would exercise market power (A. 730).

Advertisers do not purchase NCAA members' telecasting rights, nor are networks the only potential purchasers of these rights. Broadcasters and cablecasters of all varieties have an interest in purchasing the rights, and for reasons that may go beyond or be totally unrelated to the needs of advertisers.

Networks may purchase college sports programming to improve their image, and thus increase consistent patronage to the network, regardless of the specific needs of advertisers (A. 793). The lower courts found that for networks, there is no substitute for college football, that they need college football to offer on Saturday afternoon, that CBS "went dark" for one-half the broadcast time opposite ABC on Saturday afternoons when ABC had exclusive rights to televise college football, and that ABC was even willing to suffer a net loss to televise college football for the intangible benefits it received from being affiliated with the sport (Statement, ¶ 15). NCAA's own media expert, Paul Klein, provided substantial testimony supporting these findings (A. 792-795).

NCAA supplies no reason why the networks should be disregarded, other than the observation that the network demand is influenced by what it can in turn sell to advertisers. This is true for every purchaser of raw materials or wholesale products, but has never led a court to disregard these purchasers in favor of the exclusive consideration of transactions involving a remote buyer. The needs of the remote purchaser are of course still relevant in analyzing the sales transaction at issue, as both respondents' experts and the courts recognized, but they are no reason to disregard it.

Moreover, advertisers are not involved at all in a significant and growing segment of the television industry. Subscription and pay-per-view television involve direct payments by viewers and no advertising at all.[50] NCAA's media expert Klein, in his description of the television industry (Tr. 1262-68), described this form of telecasting as "a blossoming, growing thing" which is starting to overtake

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[50] Subscription television is purchased by the viewer for a flat fee, and carries no advertising. HBO is an example (Tr. 1264). Pay-per-view permits the telecaster to sell a *particular* program, such as a sports event. It is described by NCAA media expert Klein as "the extension of the theater, the extension of the stadium". The viewer pays for the specific show he sees (Tr. 1265-66).

network broadcasting (Tr. 1268-71). John Mohr, vice president of sports programming for a national subscription television service, "ON TV", testified that the viewers' greatest demand of its sports programming was in local and regional markets, and that sports programming was critical to the existence of subscription television (Tr. 515). Because of NCAA's restrictions, however, subscription television's college football programming was seriously stifled (A. 580-82; Tr. 513, 520-531). Thus, NCAA is mistaken in its assertion that "viewers aren't doing the paying" (Br. at 38).

Even granting all of NCAA's implicit assumptions, (1) that advertisers must ultimately buy the telecasting rights, (2) that the needs of networks are perfectly reflected by the needs of advertisers, and (3) that NCAA has not restricted viewership, only diverted viewers from numerous local games to a few national games, suppression of diversity remains as a harmful reduction of output. NCAA's media expert Klein testified at trial that television viewership does not increase much as the number of available channels increases, and does not increase at all beyond four channels (Tr. 1250). If NCAA is correct, an agreement by the eight telecasters in a market that only four would be on the air at a time would not restrict output as NCAA defines it at all (viewership would be the same), and would share some of NCAA's benefits of "successful competition," lower costs and higher profits. Similarly, if all bus manufacturers were to agree to manufacture fewer buses, and if this were to result in fewer bus routes but no fewer bus riders (and therefore no fare increase), NCAA would claim output had not been suppressed, and that new efficiencies had been created — since fewer buses were doing the job of many, saving gas, repair expenses, and overhead. The inconvenience and restriction of choices of riders, and the demise of smaller bus companies would be irrelevant.

International Boxing Club v. United States, 358 U.S. 242 (1959), is controlling. There, promoters of championship heavyweight boxing contests obtained exclusive rights in the promotion, broadcasting and televising of professional world championship boxing contests. The promoters' argument to this Court was much less ambitious than NCAA's: "Appellants launch a vigorous attack on the finding that the relevant market is the promotion of *championship* boxing contests in contrast to *all* professional boxing

events." 358 U.S. at 249. The Court rejected the argument on the ground that "championship boxing is the 'cream' of the boxing business, and . . . is a sufficiently separate market of the trade or commerce to constitute the relevant market for Sherman Act purposes." 358 U.S. at 252.[51]

That championship boxing was a market apart from other boxing was premised on the lower courts' aggregation of indicia of special popularity of championship events, such as television ratings. Exactly the same kind of data was utilized in the opinion of the district court here. Yet it is these kinds of factors which NCAA contends must be "adjusted" out of college football before comparing it to potential substitutes to determine whether there is market power (Br. at 42-43).

Almost all of NCAA's arguments and studies relate to the purchase of commercial time by advertisers, rather than the sale of football rights to telecasters. However, NCAA does address the increases in the 1982-85 contract price per television exposure, arguing (Br. at 44) that the district court erred in failing to account for inflation when it analyzed those prices. The district court was evaluating future prices, for which the consumer price index was not available, and it acknowledged that "some of the difference is to be expected as a product of inflation," while observing that "the sums to be paid by CBS and ABC are truly extraordinary"[52] (D.C., 77a, 123a). NCAA's account of the price-per-exposure in "real dollars" is both inaccurate and unsupported by its references to the record. Using 1970 dollars (as NCAA purports to do), the price-per-exposure is $576,694.22 in 1977, $750,840.39 in 1978, $551,674.02 in 1981, and $849,136.22 in 1982.[53] The percentages of increase in "real dollars" for the last two years where new (multi-year) contracts were

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[51] The Court cited its former decision in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), where it found a relevant market for first run movies, vis a vis all motion pictures, in the largest cities of the nation. *International Boxing*, 358 U.S. at 251-52.

[52] "Extraordinary" is also the term used by ABC, sole purchaser of NCAA football for the sixteen consecutive years preceding the 1982-85 contract, to describe the price increases (A. 430).

[53] Figures based on Urban Wage Earners and Clerical Workers annual averages for all items, Consumer Price Index.

negotiated, i.e., 1977 to 1978, and 1981 to 1982, were 30% and 54%, respectively.[54] NCAA cannot attribute these price increases, in real dollars, in the last two periods where new contracts were made, to "catching up on inflation", since inflation is factored out.[55]

The remainder of NCAA's analysis is devoted to its lonely pursuit of the question of whether NCAA has market power over advertisers, with whom it does not even deal. Whether it does or not is irrelevant, since it is already established that it does have such power over telecasters, with whom it has contracts which will yield more than 250 million dollars.

But even NCAA's contention that it has no market power over advertisers depends on overturning factual findings against it. The district court, assuming *arguendo* that only market power over advertisers mattered, concluded NCAA possessed such power (D.C., 75a). In its analysis for market power over advertisers, NCAA's tests were largely admitted at trial to have little probative value. For example, the argument that advertisers spend most of their money elsewhere (Br. at 41) says nothing at all about whether the 5% they do spend on NCAA football fulfills a particular need not satisfied elsewhere. Failure to have "captive buyers" negates the existence of one particular species of market power, but does not disprove it generally (A. 738-39). Similarly, while dissimilar price movements negate the inference that products are in separate markets, similar movements do not show that products are in the same market (A. 734-35). And failure of advertising prices per minute to fall from 1960 to 1981 with increases of advertising time could depend on so many variables that it was admitted to have little reliability as a market indicator (A. 733-34).

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[54] Even using NCAA's inaccurate figures, there was a 48% increase in "real dollars" from 1981 to 1982. NCAA does not give the real dollars figure for 1977.

[55] NCAA offers alternative figures dependent upon its theory, criticized *supra*, that only market power over advertisers is important. These figures for the "real price per 1,000 viewers as a measure of price changes over time" (Br. at 45) were not offered by NCAA at trial, and are not supported by its references to the record. Further, a *failure* to exhibit price increases would not show a lack of market power, since NCAA has always monopolized the market, and thus priced at supracompetitive levels (D.C., 118a-119a; 10th, 19a).

V. NCAA IS A MONOPOLIST

Since the relevant market was properly defined, NCAA has violated §2 of the Sherman Act. The district court found such a violation. The Tenth Circuit neither affirmed nor overturned it, but in any event, respondents may defend the judgment on any ground which the law and the record permit *(supra* n. 9). As both lower courts observed, NCAA made no attempt to deny that if college football television is a relevant market, it is a monopolist (D.C., 124a-125a; 10th, 20a n.16). NCAA is a monopolist because it possesses monopoly power in a relevant market, and has willfully acquired or maintained that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

Thus, NCAA could not prevail even if it were correct in contending that it should be treated as a single entity, because its members' combination has created a monopoly. *Cf., United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964) (Combinations forming joint ventures pose the same kinds of risks as mergers).[56]

CONCLUSION

The decision of the Tenth Circuit, upholding the district court, should be affirmed.

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[56] NCAA claims to be puzzled about some features of this case which do not accord with its economic theories, such as the "litigation posture of the parties in this case" and the district court's finding of both monopolization by NCAA and the existence of a monopsony by the selected purchaser of NCAA members' television rights. The explanation for both questions is the same. NCAA's purchasers are very pleased to have exclusive rights to televise college football (A. 530). The Association of Independent Television Stations, Inc., representing ninety-seven independent television broadcast stations, amicus curiae here, is not so pleased. NCAA's controls create monopoly by aggregating the bargaining strength of its members to deal with the purchasers; they create monopsony in the further negotiation of individual rights fees, by the exclusivity requirement (A. 497; 616-17; 667-71; 761-63; 418-421). This is why the rights fees are always the same. To discard exclusivity (and thus the monopsony), leaves both NCAA and its purchaser with competition in the marketplace and destroys the monopoly as well.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and The University of Georgia Athletic Association, a Non-Profit Corporation, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Solicitor General agrees with us that the TV Plan and contracts have procompetitive effects that call for application of the Rule of Reason. The Rule of Reason inquiry envisaged by the Solicitor General is not, however, the traditional one, in which a court must inquire into all of the competitive benefits and detriments of the challenged conduct. He argues that a restraint "may be judged unreasonable without a full evaluation of its precise effects in the marketplace" (SG Br. 7; see also SG Br. 20).

The Solicitor General's argument that the judgment must be affirmed under the Rule of Reason depends on this Court's acceptance of his proposed new kind of antitrust scrutiny. (We do not understand the Government to argue that the lower courts carried out the detailed and careful assessment of all costs and benefits that application of the Rule of Reason

usually entails.) For the reasons that follow, we accept the Solicitor General's proposed new approach to antitrust scrutiny, but with an amendment: the "quick look" version of the Rule of Reason makes sense only if the defendant possesses market power. Otherwise there is a substantial risk that judges' cursory scrutiny of complex business practices will end in the condemnation of whatever is poorly understood. We elaborate this in Part I of this brief.

In Part II we reply to several arguments concerning the NCAA's market power. We show that only a finding of power over advertisers could establish the foundation for antitrust liability under the Rule of Reason. Neither the district court nor the court of appeals made such a finding. Finally, in Part III, we reply to respondents' boycott argument and address some of respondents' other contentions.

I. MARKET POWER IS AN ESSENTIAL INGREDIENT OF LIABILITY UNDER ANY REVISED VERSION OF THE RULE OF REASON

The Government's argument is straightforward. Some practices are so rarely procompetitive that courts properly condemn them whenever they appear. Naked cartel agreements are of this sort. Other practices are sometimes procompetitive, sometimes anticompetitive. The Rule of Reason applies to these practices. Yet a court often can conclude, after a cursory examination, that the practices in question lack procompetitive effects when employed as the defendants have employed them. The Solicitor General argues that a court may stop there and condemn the practices under the Rule of Reason, without the difficult, time-consuming, and costly inquiry that full-blown Rule of Reason scrutiny often entails. The Solicitor General concludes that the lower courts examined the NCAA's practices with sufficient care to reject them under such a standard.

We accept the Government's framework for analysis. Antitrust cases *are* excessively costly. It is highly desirable to

erect a series of presumptions and other shortcuts, based on reason and experience, that will enable courts to reach prompt judgments. We understand cases such as *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), to be based on principles of this sort. The creation of a form of Rule of Reason scrutiny based on well-grounded presumptions about what conduct is anti- (or pro-) competitive would make antitrust a better tool for examining complex business arrangements. It would decrease costs and increase predictability.

One presumption that would aid such an inquiry is that firms and associations without market power cannot injure competition. If the defendants' acts are procompetitive, they will be beneficial to consumers and the defendants alike. If the defendants' acts are not competitive, the defendants injure only themselves. Without market power, they cannot injure consumers. Antitrust inquiry should be at an end. Many courts of appeals so hold. See, e.g., *Sutliff, Inc. v. Donovan Cos.*, No. 83-1308 (7th Cir. Feb. 9, 1984); *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983); and the cases collected in Pet. Br. 34 n.19. See also *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977).

Antitrust is designed to assist consumers by maintaining the competitive conditions that lead to economic efficiency. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979). The possession of market power—that is, power to raise price significantly above the competitive level without losing so much business that the raise is unprofitable—is the *sine qua non* of injury to consumers and the economy. Many cases reflect this. Mergers are an example: when firms' market shares are small, and hence there is no market power, they may merge without antitrust constraint. There are other examples as well.[1]

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[1] Showing market power is the first stage of tie-in analysis, as *Fortner II*, *supra*, holds. Proof of market power is indispensable in the consideration of inter- and intra-brand competition called for by

(Footnote continued on next page)

This is not so say that firms that lack market power never commit injurious acts. They do. Firms may blunder in the pursuit of profits. They may make products people do not want, adopt practices that raise their own costs, or set prices too high for the market. These things create economic loss. When this happens, however, the firms bear most of the costs of their own conduct. They lose sales and profits. They suffer the discipline of competition. A court need not add to the penalty the competitive process imposes. Unless a defendant can *benefit itself by harming consumers*, the case should be dismissed without further ado.

This case is an example. Respondents say that the NCAA's TV Plan and contracts keep some attractive games off TV. The Plan denies viewers the opportunity to see some games they want to see, according to respondents. This tale is not plausible if the NCAA lacks market power. If the NCAA lacks market power, and the TV Plan removes attractive games from TV (without creating countervailing competitive benefits in the longer run), the NCAA suffers a reduced number of viewers without being able to charge a higher price per viewer. There are losses, but the NCAA suffers these losses automatically, by operation of the market, as viewers turn away. If the NCAA lacks market power, then, its choices in designing a TV package impose their own costs. The NCAA must change its Plan. Judicial interference would thwart, rather than further, this market process. (Of course, successful adherence to the Plan over an extended period supports the NCAA's principal

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Continental T.V., Inc. v. GTE Sylvania Inc., 432 U.S. 36 (1977), for without market power no vertical arrangement can imperil either kind of competition. The "dangerous probability of success" requirement in a proceeding under section 2 of the Sherman Act, 15 U.S.C. § 2, also reflects this Court's conclusion that the antitrust laws are not concerned with conduct that does not create or exercise market power. See *Swift & Co. v. United States*, 196 U.S. 375, 396, 402 (1905); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965).

argument: The Plan is procompetitive and helps the NCAA to compete for viewers against other entertainment.)

More generally, if the defendants in an antitrust case lack market power, then their acts must be (a) procompetitive; (b) competitively neutral; or (c) costly to themselves. There are no other options. Neither (a) or (b) is a ground for condemnation in antitrust. And although self-inflicted wounds (category c) have their costs, antitrust liability should not be among them. Markets are superior to courts in sifting the beneficial (category a) from the neutral and the deleterious (categories b and c). The beneficial practices survive in competition; other practices do not.

When a court tries to decide what is competitive and what is not, occasional errors are inevitable. (District courts often err on issues of pure law; the reversal rate exceeds 15 percent.[2] How much more common are errors on complex economic issues with which courts are unfamiliar? How many of these errors will elude appellate correction?) When the defendants have market power, the costs of these errors are tolerable parts of the price we pay for attacking monopoly. When the defendants lack market power, there is no reason to invite judicial inquiry and potential error.[3]

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[2] The average reversal rate of the federal appellate system is approximately 15.9%. Director, Admin. Office of the U.S. Courts, *Annual Report 1983*, at 220 (Table B-1). The reversal rate in private antitrust cases in 17.3%. *Id.* at 225.

[3] One court has made the point nicely in dismissing a Rule of Reason case even though it was not convinced that the defendant's arrangement was procompetitive or beneficial. Determining competitive benefit "would be beyond the intellectual power of this or any other court. Ultimately it is the market which will be the final arbiter of the efficiency, or lack thereof, of this [arrangement]. If [defendant] should persist in offering this [arrangement] and its competitors do not, the market will have the opportunity to choose between them. What we are dealing with are contracts made between and among consenting adults and corporations. Presumably then will act in such a way as to maximize their individual welfare, and it would be presumptuous and harmful if we were to substitute our ex post judgment for their ex ante choice." *Consultants & Designers, Inc. v. Butler Service Group, Inc.*, 620 F.2d 1553, 1560 (11th Cir. 1983).

This Court therefore should reject the Solicitor General's invitation to bypass the market-power question and start with a quick look at the competitive effects of the TV Plan and contracts. The initial reference to market power for which we argue is a safeguard against error. Many business practices are poorly understood, even by the best economists. Knowledge follows rather than precedes the success of practices in the market. Even when people know why business practices work, the explanations may be hard to convey—especially in the setting of a trial, when the judge and jury lack economic training or business experience. The response "not persuaded" is natural when a judge is presented with a novel and difficult explanation of complex behavior. Again, this case offers an illustration. The NCAA's explanations for its conduct (Br. 15-27) try to show how rules that appear at first to be restrictive will have longer-run benefits in competition. The benefits are not precisely measurable; any claim of long-run competitive gains invites judicial skepticism and demands for "better"—perhaps unavailable—proof.

Who bears the risk of nonpersuasion? When a court is "not persuaded" by the defendant's explanation of conduct—as the lower courts were "not persuaded" by the NCAA's explanations of its TV Plan and contracts—who loses? If the defendant has no market power, the plaintiff should lose.[4] There is little potential gain in condemning poorly understood conduct when the defendant has no market power; there is substantial potential loss in condemning what we do not understand.

When the defendant lacks market power, judicial errors have biased effects; they always injure competition and consumers. An erroneous label of competitive practices as

[4] In addition to the materials on the burden of persuasion at Pet. Br. 27-33, see *Paschall v. Kansas City Star Co.*, 1984-1 Trade Cas. ¶ 65,841, at 67,517 (8th Cir. 1984) (en banc) ("the burden of proof is not on the defendant to prove the absence of anticompetitive effects. Rather, it is the plaintiff's responsibility to prove all the elements of the antitrust violation.").

anticompetitive leads to improper condemnation; a mistaken belief that destructive practices are beneficial does not make much difference because, in the absence of market power, "anticompetitive" practices injure the perpetrator and tend to disappear whether or not judges order relief. The approach we advocate reduces the costs of potential judicial errors without posing any risk to enforcement of the antitrust laws against those with market power who can benefit themselves by harming consumers.

II. THE NCAA LACKS MARKET POWER BECAUSE ADVERTISERS PAY ONLY FOR VIEWERS DELIVERED

Both the Solicitor General and the respondents urge this Court to defer to the findings of the lower courts on the market power issue. If these courts had found power using the appropriate legal principles, deference would be proper. But they did not use appropriate legal principles, and the two-court rule does not call for deference to findings made with the use of flawed legal principles.

The district court defined the market by asking what plaintiffs sold, *not* what consumers bought (Pet. App. 73a-74a). This is the only reason the district court gave for disregarding the NCAA's evidence about competition among program providers to sell viewers to advertisers. The district court's approach ignores the possibility of substitution. See our opening Br. 38-36. The Government does not (and cannot) defend this as a legally appropriate way to define market power.

The Tenth Circuit abandoned the district court's reason and found market power by observing that commercials on NCAA broadcasts sell for high prices (Pet. App. 18a-19a). This approach confuses an increase in output with market power. Prices of commercial time rise as more people watch; an increase in viewership is the objective of competition, not, as the court supposed, evidence of lack of competition. The court

did not say that the NCAA receives a higher price *per viewer* than other producers receive for similar demographic mixes. Only evidence of higher prices per viewer establishes market power. Thus the Tenth Circuit also used a legally inappropriate method of inferring power. As a result, deference to the lower courts' findings is unwarranted. The undisputed evidence, recounted at Pet. Br. 40-46, is that the NCAA has no way of inducing advertisers to part with extra payments per viewer by reducing the output of football games. The NCAA therefore lacks market power.

Of course we do not say that evidence of higher prices is essential to an inference of market power. Such power usually is established by logical rather than empirical arguments. It is quite appropriate to infer power by showing how the defendants *could* exploit their position. Yet no such analysis can be offered in this case. Solicitor General does not present any argument, logical or empirical, under which the NCAA can exercise control over the price of its product by reducing output. The Government presents two arguments on market power, but neither supports the lower courts.

The first argument (SG Br. 18-19) is that advertisers "in fact do pay more for the exclusive contracts than they would pay if schools could sell rights outside the package as well." This occurs, the Government maintains, because the "exclusivity feature of the package allows the chosen few networks to deliver larger audiences to advertisers . . ." This is just another way of observing that the TV Plan and contracts increase output and thus are procompetitive. The Solicitor General does not claim that the NCAA has any power to raise the price *per viewer*. No evidence would support such a position. Larger audiences do mean larger (total) payments, *but only because output is up*. This is the opposite of objectionable market power. The NCAA has no power to raise prices by decreasing output.[5]

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[5] The Government's inference of market power from increased revenues implies that a manufacturer of pins that improved the

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The Government's other argument (SG Br. 19) is that the restraints speak for themselves. "[I]f college football telecasts actually were an undifferentiated part of a large entertainment television market, there would be no need for the networks to seek an exclusive right to telecast the games.... The fact that networks seek, and obviously pay, to limit the amount of competition from other college football telecasts ... reflects their recognition that college football is indeed a distinct product ..."

This argument has several logical problems. First, it amounts to inferring market power—and thus condemning the TV Plan and contracts—on the basis of an integral part of the procompetitive feature of the contracts. The Government agrees (SG Br. 13-15) with our argument (Pet. Br. 20-27) that the TV Plan and contracts are potentially procompetitive. Part of the competitive benefit comes from the exclusivity. The exclusivity feature helps the networks promote the series, produce higher quality games, select games at the last minute, and so on. It is inappropriate to turn around and use the device that produces these benefits to condemn the arrangements.

Second, exclusivity is a ground for inferring that there is something special about college football only if exclusivity is itself unusual. But it is not. Almost every television series is exhibited under promises of exclusivity. "Dallas" is sold exclusively to a single network. When reruns of network shows are syndicated, the rights are sold exclusively to a single station in each city. The sale is not only exclusive of other stations but also designed to ensure that reruns are not broadcast at the same time as new episodes of the series. The same is true of the sale of motion pictures to television, and indeed of almost every sports presentation. These grants of exclusive exhibition rights facilitate promotion of the shows and ensure that audiences are not splintered, reducing the value of each exhibition.

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quality of its product and sold more pins, receiving larger total revenues, must have market power. In the absence of proof that the higher revenues were attributable to a reduction in output and a higher price per pin, the inference would be unsupportable.

When almost every TV show and series is sold under the contractual guarantee of exclusive exhibition, there is no basis for an inference that any particular seller (here the NCAA) has market power. Quite the contrary, when almost every seller, famous or obscure, large or small, uses the same kind of contractual device, the appropriate inference is that none has power and that the device is an appropriate method of competing in the particular market. The Department of Justice has recognized this in other forums.[6] The television programming

[6] The FCC is considering whether to permit the TV networks to acquire syndication rights to series made by independent producers. In the latest filing with the FCC, the Antitrust Division recounted: "The Department has argued consistently that the networks should be given control over syndication of programs that are in their network run. This will ensure that the networks are able to capture any efficiencies available from coordinating first-run and syndicated episodes of the same series. Such coordination would promote efficent use and promotion of the programs. . . . [The networks should be able to] restrict the time of day in which a program is broadcast, or the frequency with which it may be broadcast, during the network run. This . . . would allow the networks to capture any efficiencies resulting from coordination of new and syndicated episodes, thereby giving the networks an incentive to put programs into syndication most efficiently. . . . The most obvious restriction of this type is the right to exclusive exhibition of a program's episodes in prime time. It has long been standard industry practice for the networks to obtain such rights to assure that syndicated episodes do not 'free ride' on the network's prime time first-run exhibitions. Thus, at a minimum, the rule should [permit] the networks to obtain exclusivity in prime time during the network run." Comments of the Department of Justice, *In re Amendment of 47 C.F.R. § 73.658(j); the Syndication and Financial Interest Rule*, FCC BC Docket No. 82-345, filed Sept. 20, 1983, at 13-14.

These comments are significant for two reasons. First, the Antitrust Division depicts exclusivity as the ordinary state of affairs in broadcasting rather than as evidence of market power. Second, the Division explains how exclusivity may be procompetitive. Indeed, in an earlier filing in the same FCC proceeding, the Antitrust Division essentially adopted the argument we make in this case. It described how power over advertisers—*not* over viewers—is the fount of any

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market as a whole is competitive, with hundreds of program suppliers and thousands of advertisers competing.[7] There is accordingly no basis for an inference of market power here.

Respondents take a different approach to market power. They simply deny that it is appropriate to look to competition for viewers (Resp. Br. 37-38). They maintain that the television stations are the "direct" buyers, and that we have not cited "a single example from the annals of antitrust jurisprudence where a court or commentator has suggested disregarding the immediate buyers, in favor of ascertaining a seller's market power over the remote buyers of a product" (*id.* at 37). According to respondents, this Court should endorse the conclusion of the lower courts that college football has a special attraction to many viewers, and then stop.

Respondents themselves do what they say no court has ever done. They (and the lower courts) look at the supposed desires of the viewers (indirect demanders) in order to ascertain whether the NCAA has market power over TV networks (the direct buyers). We, too, want the Court to look at the demand of an indirect purchaser. We just want the Court to notice that the viewers, who respondents portray as the exploited buyers, *do not buy*. The people who pay for this product are advertisers. The NCAA has no power over these, the actual

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market power a network or program producer may possess. Comments of the Department of Justice dated January 26, 1983, at 37-39.

[7] In addition to the arguments at Pet. Br. 40-46, see, e.g., Woodbury, Besen & Fournier, *The Determinants of Network Television Program Prices: Implicit Contracts, Regulation, and Bargaining Power*, 14 Bell J. Econ. 351 (1983) (careful empirical study finding that prices in the TV market depend on audience size, a clear indicator of effective competition); Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1982) (showing why courts should view sports leagues as joint ventures operating in large, competitive entertainment markets).

payors.[8] Viewers' preferences can not create the market power respondents suppose.

Courts define markets to measure power over price. Power over price arises, if at all, from the demands of the ultimate users of products. Thus if there is only one producer of Kryptonite, and the sole direct purchaser uses Kryptonite to make ashtrays, the producer has no market power if glass ashtrays made by other firms are equally acceptable to consumers. A court necessarily looks to the real buyers in order to determine market power.

Advertisers do not give two hoots about what programs summon viewers to their sets. They simply "buy audience", taking demographic characteristics of the audience into account. The data (see Pet. Br. 40-46) show that there are plenty of ways to assemble audiences with demographic qualities equal to or better than the NCAA's (which is why other programs sell for substantially higher payments per thousand viewers, see Pet. Br. 43 n.29). The data also show that the prices of all ads on all programs move together, and such joint price movement is "the single most useful guide to market definition". Areeda, *Market Definition and Horizontal Restraints,* 52 Antitrust L.J. 553, 566 (1983). The lower courts' inference of power is therefore unsupported.

Respondents err in asserting that "the annals of antitrust jurisprudence" contain no cases looking to indirect buyers to determine whether there is market power. Almost every

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[8] This fully distinguishes *International Boxing Club v. United States,* 358 U.S. 242 (1959), which defined a market of championship prize fights because championship fights are especially attractive to many people. The buyers in that case were those who attended the fights and watched movies or closed circuit TV. They paid directly. Those with special preferences could be exploited by a monopolist. There is no similar basis for inferring market power here. (The brief mention of broadcast television in *International Boxing* does not suggest that anything turned on this subject, and the Court never considered the possibility that in free TV the advertisers are the buyers. The parties had not made such an argument.)

merger case defines the market by looking to the ultimate consumer rather than the immediate buyers. For example, in *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), a merger of beer producers, the Court looked at shares of a market of beer consumers. It was irrelevant that multiple levels of intermediaries (wholesalers, retailers, jobbers, and others) lay between brewer and consumer, and that the brewer had no power over these wholesalers (who could switch to distributing cereal or ginger ale if beer became unattractive). See also *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967) (similar analysis of bleach). *United States v. Continental Can Co.*, 378 U.S. 441 (1964), defined a market of cans and bottles on the ground that many ultimate consumers found cans and bottles to be substitutes, even though most producers of containers (and most beverage manufacturers) used one or the other, but not both. Again, the preferences of the ultimate consumer were the dispositive consideration because they were the source of power. This list of similar cases could be extended.

Respondents also argue (Resp. Br. 36-37) that even if NCAA football is not a market, it is at least a "submarket." Here, too, respondents lose sight of the purpose of defining a market. Market definition is not an exercise in lexicographic legerdemain. It is, rather, a proxy for power to increase price by reducing output (see Pet. Br. 36-37, 45 n.32, collecting authorities). Reference to a "submarket" is appropriate only when the submarket indicates such power over price.[9] Whether NCAA football is a "market" or a "submarket" is immaterial, given our demonstration that the NCAA cannot drive up price by reducing its output.

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[9] See Areeda, *supra*, 53 Antitrust L.J. at 583-84 (emphasis added): "Antitrust law uses the relevant market concept only for the purpose of inferring the defendant's market power from his market share. To the extent this is possible at all, it depends on identifying the *one* product and geographic market that *best* gives the tribunal insight into the defendant's power . . . Accordingly, for each product and region, there can be only a single legally relevant market and not a multiplicity of legally relevant submarkets."

III. BECAUSE THE NCAA LACKS MARKET POWER, THE AGREEMENTS IN QUESTION MUST BE EITHER PROCOMPETITIVE OR NEUTRAL

The Solicitor General's argument that the per se rule does not govern this case (SG Br. 4-15) is compelling. The Rule of Reason applies, and we have shown above that market power is an essential ingredient in a case under the Rule of Reason. Thus even if this Court, like the Solicitor General, ultimately is not persuaded by the NCAA's arguments concerning the competitive virtues of the TV Plan and contracts, it should reverse the judgment.

A. The Plan is not Unlawful Per Se as a Boycott or as Monopolization

Respondents attempt to avoid this conclusion by arguing that the TV Plan and contracts are unlawful per se as monopolization (Resp. Br. 42) and as boycotts (Resp. Br. 16-17).

The monopolization argument adds nothing to the analysis under § 1 of the Sherman Act. Respondents offer no reason why conduct of this sort might be deemed unlawful under § 2 after it has passed the stricter scrutiny applied to agreements under § 1.

The boycott argument was adequately answered by the court of appeals (Pet. App. 22a-25a). Membership organizations are entitled to enforce their lawful rules. If the University of Oklahoma decides to field a professional football team, paying its players for services rendered, the NCAA, an organization of colleges running amateur programs, is entitled to penalize or expel Oklahoma. The NCAA may refuse to admit universities that do not adhere to specified academic standards. The Big Eight Conference may refuse to admit Harvard as a member.

The antitrust law does not prevent enforcement of rules that are not anticompetitive. If it did, antitrust would override the entire state law of voluntary organizations. The legality of a boycott accordingly depends on whether the underlying rule is anticompetitive. This Court implicitly recognized as much in

National Society of Professional Engineers, supra. The Society adopted a rule against competitive bidding, enforced by a boycott. This Court determined the legality of the practice by asking whether the rule (rather than the boycott) was anticompetitive. It should do the same here.[10]

B. The "Exclusivity" Features of the Plan are Procompetitive

If the NCAA lacks market power, it does not matter whether the lower courts' assessment of the NCAA's arguments concerning competitive benefits is correct. Nonetheless, we think it appropriate to respond to some of the Solicitor General's arguments on this subject (SG Br. 20-30).

The Government's repeated assertions that the lower courts rejected the NCAA's arguments on the facts[11] appear to reflect unfamiliarity with the record. Respondents are more accurate in stating what the court of appeals did. On some issues, the courts found "not enough evidence" (Resp. Br. 5) to support a conclusion; on others the district court's findings were "not overturned" (Resp. Br. 28) [but also not endorsed] by the court of appeals; still other factual disputes were "never reached" (Resp. Br. 32 n.39) by the Tenth Circuit in light of its placement of the burden on the NCAA.[12] See also Pet. Br. 17-

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[10] This is the path followed in the lower courts. In addition to the many cases cited at Pet. Br. 15 n.6 and SG Br. 14 n.16 that apply the Rule of Reason to "boycotts" by sports leagues, see, e.g., *Marrese v. American Academy of Orthopaedic Surgeons*, No. 81-2671 (7th Cir. Jan. 3, 1984) (en banc), slip op. 9: "[B]oycotts are illegal per se only if used to enforce agreements that are themselves illegal per se—for example price fixing agreements."

[11] E.g., SG Br. 27: "The courts below found that the NCAA package does not directly contribute to competitive parity, nor does it increase TV viewership."

[12] This is not to say that respondents are equally scrupulous about all factual issues. The assertion by respondents that the price of "exception" telecasts was "fixed" by the NCAA (Resp. Br. 15 n.8, 25 n.28) is simply untrue. See A. 67-69, 98-99 (current contracts give

(Footnote continued on next page)

19, detailing the court of appeals' posture on disputed questions of fact. This Court therefore may not properly apply the two-court rule to the "findings" on the NCAA's contentions. The few things on which the lower courts agree are largely negative, such as that on some matters the NCAA did not carry a burden of showing the "necessity" of the arrangements or that there were "less restrictive" ways to achieve the benefits of the arrangements (e.g., Pet. App. 10a-15a). The courts simply did not find "no benefit."

The Solicitor General's principal submission on the question of competitive benefits is that the NCAA has not adequately explained why the TV Plan and contracts should give "exclusive" rights to the networks (e.g., SG Br. 20-22 & n.20). Here, too, there is a problem of description: the Plan does *not* create "exclusivity." Three networks (ABC, CBS, and Turner) possess rights to telecast games, and the "exceptions" rules allow the broadcast of as many games outside the network contracts as within their framework (A. 41-44, 244; Pet. Br. 3-4). We take it, though, that what troubles the Government is the rule that only one network game may be on the air at one time.

This form of "exclusivity" is no different from the exclusivity of any other network series. The producer of "Dynasty" will ensure that episodes do not air in conflict with one another. Such head-to-head airing simply splits the audience, reduces the incentives to produce good episodes (since each one will be worth less to a network), and makes it more difficult to promote the series as a competitor to other entertainments. If one station or network advertises, another may try to take a free

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(Footnote continued from preceding page)

complete freedom to colleges). Respondents' claim that the price per game under the network TV contracts was "fixed" by the NCAA (Resp. Br. 14) also is untrue; at least since 1979 the networks have established their own price per game without following the NCAA's recommendations (A. 522-24, 753-55; Tr. 1184-85). At all events, neither of these points would suggest any problem with the arrangements. If it is lawful to establish a total package price for a TV contract, it is also lawful to divide the proceeds. *Broadcast Music* establishes at least this much.

ride. This is directly analogous to the free riding problem in *Continental T.V., supra.* The Department of Justice's skepticism about these procompetitive effects with respect to football is at odds with the Department's proffer of almost identical justifications in arguing to the FCC that networks should be granted "exclusive" rights to TV series during their initial runs (see note 6, *supra*).

The kind of "exclusivity" about which the Government is concerned also is important in fostering long-run balance on the playing field, and thus in creating more exciting games and promoting competition against other entertainments on TV. "Exclusivity" makes it possible to limit each college's TV exposures; this spreading out of appearances has powerful effects on recruiting athletes, enhances attendance in the stadiums and rivalry over the field (Pet. Br. 20-22). It is important (even "necessary") for the NCAA to enforce appearance limitations by entering into exclusive broadcasting arrangements.[13]

The Government suggests that the "balance" benefits could be achieved under contracts drafted by the networks. It implies that each network could line up a stable of teams, and that if appearance limits assist in competition over the longer run, the networks will impose these limits without the need for limits by the NCAA. But such a plan is vulnerable to holdouts. Suppose ABC and CBS sign up 50 teams apiece and limit the annual number of telecasts per team in order to assure long-run balance. (We put to one side the question what happens when an "ABC team" plays a "CBS team.") This creates new incentives for NBC and the remaining teams. These teams would hold out and broadcast "spot" games on NBC. These holdouts would obtain additional exposure and improve their recruiting and receipts at the expense of adherents to the other networks' contracts.

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[13] See also J. Markham & P. Teplitz, *Baseball Economics and Public Policy* (1981) (advancing for baseball many of the same efficiency arguments we offer for the football arrangements).

This would spoil the plan, and other teams would be induced to drop out rather than fall behind. ABC and CBS could not pay enough to bring all into the fold. Like the owners of the last parcel of real estate needed to complete a plot for a large development, the holdouts could insist on receiving a disproportionate share of the returns. Because each school is a potential holdout and can demand disproportionate returns, yet the networks cannot pay the teams (collectively) more than the total benefits of the package, holdouts could undercut the arrangements. Only the NCAA, to which all major football institutions belong, can get around the holdout problem.

C. Basketball Arrangements do not Undercut the Arguments for the Benefits of the Football Plan

Both respondents (Br. 29) and the Solicitor General (Br. 22) join the district court (Pet. App. 47a-48a, 76a) in arguing that the difference between the arrangements for college basketball telecasting and those for football undercuts the NCAA's arguments. If the NCAA's points about competitive benefits are true, they ask, why is basketball not covered by exclusive contracts? Of course, we might turn the question around: If restrictions on TV coverage exploit market power to create monopoly profits, how come the NCAA has missed the boat on basketball? The difference between the television arrangements for football and those for basketball is therefore more ambiguous than first appears. And we think there are good explanations for the difference. See A. 639-41.

First, colleges can mount successful, competitive basketball programs at lower cost than in football. The pool of superior high school talent in basketball is very large, and the costs of maintaining a 12 to 15 player squad is much less than the cost of maintaining a 100 player squad in football. The costs of recruiting and supporting players are lower. There is accordingly less need of a program of television controls designed to influence recruiting or other elements of rivalry.

Second, basketball viewership tends to be more regional. Local teams attract more attention than teams from far away.

Reflecting this fact, the regional athletic conferences often implement their own basketball programs. The Big Eight Conference has done so (see Pet. Br. 35; Tr. 210-21). This program establishes a "Big Eight Game of the Week" with exclusive telecasting rights. It supplies many of the benefits of the NCAA promotion of football.

Third, each college basketball team plays approximately 30 games per year, compared to 11 for football. There are basketball games every evening and both afternoons and evenings on weekends. The increase in the number of matches available for telecast also makes it easier for broadcasters to find "competitive" games without resorting to mechanisms that affect recruiting opportunities. The proliferation of basketball games (and game times) makes it easier for multiple schools to obtain TV exposure and the concomitant recruiting benefits. It also makes it easy for colleges to schedule their home games so that they do not conflict with TV broadcasts that might affect attendance. Things are not so easy for football, because 95% of all college games are played on Saturday afternoon, the time best suited for attracting alumni and fans from out of town.

Fourth, basketball arenas are smaller than football stadiums. Most of the fans are students. It is easier for colleges to fill their arenas despite competition from TV; they need not attract alumni from out of town. Fans may watch TV one evening and attend a game the next. DePaul students and alumni will not stay home to watch UCLA play Notre Dame on TV. Because of these differences between basketball and football, the Court should not draw the inference respondents and the Solicitor General urge.

D. Topco Does Not Support Respondents

Respondents contend (Br. 26-27) that many of the NCAA's arguments are inconsistent with *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). Respondents say that *Topco* rejects efforts to justify diminution of competition in one sector of the economy by an increase in competition in another, and they portray the NCAA's arguments as such forbidden efforts because they justify a reduction in output of one product (college football on TV) by an increase in output of another.

We think that respondents misunderstand our points. We have not argued, in the Court's words, that "destruction of competition in one sector of the economy [may be balanced against] promotion of competition in another sector" (405 U.S. at 609-10). Only one "sector of the economy" is at issue here. That "sector" is entertainment. Live and televised football games are elements of that sector. The TV Plan and contracts do not "destroy competition" in this or any other sector or market. Like the internal arrangements of General Motors or any other firm, the arrangements challenged here are cooperation that promotes competition in the only sector at issue. They expand output. There is no reduction in one place to compare against an increase elsewhere. *Topco* is irrelevant.

We return to where we began. The NCAA's TV Plan has potential competitive benefits, so the Rule of Reason applies. Under the Rule of Reason the NCAA must prevail, if for no other reason than that it lacks market power. It cannot increase its profits by reducing its output of games.

If plaintiffs are right, and the TV Plan denies viewers the games they most want to see, then the NCAA pays a penalty in lower revenues. It cannot make itself or its members better off by frustrating viewers' desires. There is no need of antitrust to protect the NCAA's members against misjudging their customers' (and their own) best interests.

If we are right, on the other hand, the TV Plan and contracts are output-increasing methods of competing against other entertainment. They promote rivalry on the field and thus attract viewers; they facilitate last-minute selections of exciting games, top-quality professional productions by broadcasters; they increase live attendance. There is no warrant for antitrust to put a stop to such beneficial practices.

So whatever the Court thinks about the competitive merits of the TV Plan and contracts, an antitrust remedy is unjustified. The NCAA will continue to respond to market forces in an effort to produce the quality college football people want to watch.

CONCLUSION

For these reasons, as well as those set out in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

INTV is a national association representing some 103 independent television broadcast stations, that is, stations not affiliated with any national network.[1] Because inde-

[1] The following abbreviations will be used throughout:
"INTV" is the Association of Independent Television Stations, Inc.;

pendent stations do not receive programs from a network, they must either purchase or produce programming to fill their entire broadcast day. Independent stations are direct competitors of broadcast and cable television outlets for ABC, CBS and Turner, the exclusive participants in the NCAA Television Plan. The NCAA Plan effectively prevents colleges and universities from selling television rights to their football games to independent stations, and prevents independent stations from purchasing and broadcasting such games in competition with the networks.

STATEMENT

This case involves the sale of the telecasting rights to college football games. NCAA football is the product which INTV member stations wish to buy from schools such as Oklahoma and Georgia, but because of the NCAA Television Plan, cannot. The purchasers at issue here are television stations. Stations use programs to attract viewers and advertising dollars. Stations excluded from college football cannot nearly as effectively attract viewers or advertisers during its broadcast.

"NCAA" is the petitioner, National Collegiate Athletic Association;

"Oklahoma" is respondent The Board of Regents of the University of Oklahoma; "Georgia" is respondent the University of Georgia Athletic Association;

"NCAA Television Plan," "NCAA Plan" and "Television Plan" refer to NCAA's set of rules governing permissible television coverage of NCAA college football games;

The Brief for the Petitioner is referred to as "NCAA Br.";

References to the Joint Appendix are designated "J.A." followed by an appropriate page number;

References to the District Court opinion shall be to the Petition's appendix and designated "D.C.".

SUMMARY OF ARGUMENT

The NCAA possesses and abuses market power. The relevant market, which NCAA dominates, is that for television rights to live college football played on Saturday afternoon. The purchasers of this product are broadcasters. If broadcasters are deprived of fair access to live college football they have no product which can as profitably be sold during that time slot. The lost opportunity cannot be made up at another time.

Live college football attracts a large audience of the most desirable demographic composition. Advertisers are willing to pay a premium to reach it. In order to attract advertisers for this unique product, broadcasters must have access to live college football during its time of play.

The NCAA Television Plan has one purpose and effect: to restrict output of a unique product. Unlike the restraints in this Court's *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), NCAA does not permit its members to sell broadcast rights to their football games outside the NCAA Plan. The Plan's restrictions of output have no logical relationship to its asserted benefits, and exist solely to extend NCAA's dominance over a unique product and further the dominance of the major networks in a particular broadcast time period.

ARGUMENT

I. THE NCAA POSSESSES MARKET POWER.

Both courts below correctly held that the relevant market is television coverage of live college football, which NCAA dominates. NCAA's dominance makes the restraints of its television plan abusive and unreasonable. NCAA concedes:

> (1) for many viewers, there is no substitute for college football and thus networks must show college football, and (2) advertisers pay more, per viewer, to reach these viewers than they pay for television viewers on average. . . . we do not dispute these findings by the lower courts . . . (NCAA Br. 33).

Nevertheless, NCAA argues for a never-defined market different from live television coverage of college football. The argument is based upon a single assertion, "advertisers can switch" (NCAA Br. 38), which completely ignores the nature of the broadcasting business and distorts rational antitrust analysis of the NCAA Television Plan.

A. Broadcasters, Not Advertisers, Are the Purchasers of NCAA's Football Product.

Advertisers do not purchase football programming; broadcasters do, although the NCAA plan effectively precludes INTV member stations and other television stations from such purchase opportunities. Broadcasters are licensed to use a portion of the radio-magnetic spectrum to present programming; they sell time during their broadcast day to advertisers. If time cannot be profitably sold, there is no way for a broadcaster to make up that lost opportunity at another time. Whether or not "advertisers can switch," broadcasters cannot switch.

B. For Broadcasters, There Is No Effective Alternative to NCAA Football During the Time It Is Aired.

NCAA's argument distorts and ignores the evidence on which the District Court based its market definition.

This record establishes that, for broadcasters, there is no economically effective alternative programming available when live college football is aired.

The record before the district court shows what every advertiser of beer or automobiles knows—that live college football television attracts an audience with a heavy concentration of men, including a large proportion of college-educated and higher-income men. J.A. 590-605 (testimony of Ira Horowitz). Saturday afternoon, when college football is primarily played, is one of the few time periods during the week when such an audience is available. Paul Klein, one of NCAA's experts, testified that "Saturday afternoons, it [college football] is uniquely positioned, that's when the games are played, and that's when the audience is available." J.A. 787.

Not only does live college football attract a large audience of unique composition, the record shows that advertisers are willing to pay a premium to reach it. The cost per thousand viewers for advertising time on a Saturday afternoon college football game is approximately two and a half times the cost per thousand viewers for advertising on other programming generally. J.A. 511-12 (testimony of James C. Koch). Indeed, advertising time on college football sells for 75 percent more per thousand homes than advertising time on major league baseball programs. J.A. 602 (testimony of Ira Horowitz).

Programming which might compete effectively with college football on Saturday is not available. By law, professional football is unavailable for Saturday telecasting. 15 U.S.C. § 1293. Other Saturday programming is simply not competitive with college football. That the potential profit to be derived from any other available program on Saturday is so much less than from college football is graphically demonstrated, as the district court pointed out (D.C. 72a), by the decision of the CBS network, when

only ABC carried college football, to simply offer no programming to its affiliates on Saturday afternoon.[2]

The change from the 1978-81 NCAA contract to the 1982-85 arrangement also proved the singular value which college football has for broadcasters. In 1978-81, ABC had the exclusive rights to televise NCAA football, enabling it in NCAA's view (NCAA Br. at 27-29) to promote "brand identification" and a "series." In 1982, however, NCAA divided the program among two networks and Turner Broadcasting System, a "superstation" whose signal is widely distributed over cable television systems. Thus, the 1982-85 contract removed ABC's exclusively while also drastically raising the price which ABC would have to pay. D.C. 57a-61a. Yet ABC willingly agreed to the new, significantly less favorable arrangement.

If a television broadcaster wants to maximize its profits on Saturday, it must put on college football. Whether it could obtain similar profits on other days from other programs is irrelevant, for a broadcaster cannot substitute for the lost opportunities on Saturday. The conclusion that live college football television is the relevant product market must therefore be affirmed, not because college football is what NCAA and its members have to sell, but because it is what programming customers—broadcasters—need to buy for Saturday afternoon, the time it is primarily available.

Because live college football television is a distinctive product category constituting its own relevant product market, independent broadcasters are harmed by the

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[2] Another indication of football's unique attractiveness was the inability of many advertisers to find effective substitutes for professional football programs during the National Football League strike, resulting in lower revenues for broadcasters and dissatisfied advertisers. See "Thrown for a Mighty Big Loss," *Time*, Oct. 25, 1982, at 66.

NCAA Plan which almost entirely deprives them of access to it, even though many schools would sell their rights for television coverage if the NCAA would permit them to do so (D.C. 91a).

II. THE NCAA TELEVISION PLAN RESTRICTS COMPETITION.

Both courts below properly found the NCAA Television Plan to violate the antitrust laws under *per se* and rule of reason standards. NCAA not only possesses market power, it abuses it, restricting competition through its Television Plan.

A. The NCAA Plan Is Unlawful Because, Unlike *BMI*, NCAA Members Are Not Free To Sell Their Football Games Outside the NCAA Package.

NCAA contends that the provisions of its Television Plan are reasonably ancillary to its other activities, and promote competition. NCAA analogizes its plan to the blanket licensing arrangements upheld against a *per se* challenge in *Broadcast Music, Inc.* v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979) ("*BMI*"). On the contrary, *BMI* shows precisely why the NCAA Plan violates the law. ASCAP members granted "ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights to license the use of their compositions for other purposes." 441 U.S. 1, 11.

NCAA's Plan does not meet *BMI's* standards. Its attorney, Professor Easterbrook, argued *BMI* before this Court; in the brief for United States as *amicus curiae*, he wrote:

> But an agreement among competitors to market a product or service fundamentally different from anything any of them individually can market has never been found to be price fixing under circumstances where, as here, *there is no agreement not to sell the*

> *individual products or services at any price the competitors choose*, and where the project is not a disguise for price fixing.
>
> • • • •
>
> *A different question would be presented if ASCAP's members agreed that* they would set the prices at which they could individually sell licenses, or that *they would only sell through the blanket license. Such agreements would not be essential to the enterprise of marketing the blanket license.*

(Brief for the United States as *Amicus Curiae*, *BMI*, Nos. 77-1578 and 77-1583, pp. 9, 11, emphasis added).

BMI placed no restrictions on the right of composers and users to make agreements outside of the pooled arrangement; NCAA, by contrast, in its "exception telecast" rules, places limits on non-series telecasts far more stringent than those on its own series and totally forbids any other sale of television rights. Further, as the Court pointed out, 441 U.S. at 18-19, the commerce being restrained in *BMI* existed solely because of federal copyright law and Congress appeared to have contemplated the sale of blanket licenses in the Copyright Act. College football television is not dependent on any similar federal construct; nor does NCAA point to any congressional mandate for its restrictive licensing arrangements. NCAA members may only sell through NCAA's blanket plan. NCAA members may not sell, and INTV members are unable to buy, individual football games for broadcast except under the severe and illogical restrictions of the exception telecast rules.

The *BMI* arrangements were found to be essential to the conduct of its business because the market there involved thousands of composers and users and millions of compositions and individual transactions. As a practical matter, the Court found composers had no alternative to a joint marketing arrangement which could also detect

copyright violators. There is no similar practical necessity for the joint marketing of college football games. Networks and local stations clearly could and would freely negotiate with individual schools or conferences for the right to broadcast games; such arrangements are commonplace in college basketball (D.C. 47a-48a). Of course, in the few instances where exception telecasts are permitted by NCAA, such negotiations already occur for football games. The scale of the individual transactions involved in the sale of college football television rights is much greater than most of the music licensing transactions considered in *BMI*, and the number of transactions involved in football is much less than with music performance rights. Thus, there is no necessity for NCAA to serve as the exclusive bargaining agent for college football television.

B. The NCAA Plan Restricts Output.

The district court held that the NCAA Television Plan was a *per se* violation of the Sherman Act, and alternatively, that its provisions were illegal if analyzed under the rule of reason. (D.C. 100a, 104a, 115a); *cf. National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 687-92 (1978). NCAA argues that, as a joint venture, its Television Plan must be judged by the rule of reason. NCAA Br. at 10-14.[3] Regardless of whether the plan contains naked horizontal restraints sufficient to invoke *per se* condemnation, or the restraints are adjudged sufficiently unrelated to a legitimate goal so as to make them unreasonable, the findings of illegality must be upheld. *See* Louis, *Restraints Ancillary to Joint Ventures*

[3] NCAA attempts not only to escape *per se* analysis, but the reach of the antitrust laws altogether, by the mere labelling of its activities a "joint venture." Sealy was a "joint venture" whose joint activities violated the antitrust laws *per se*. *United States* v. *Sealy, Inc.*, 388 U.S. 350, 351, 354-58 (1967). Topco was another joint venture whose practices constituted a *per se* violation. *United States* v. *Topco Associates*, 405 U.S. 596 (1972).

and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?, 66 Va. L. Rev. 879, 883, 894 (1980). Examination of the restrictions in the NCAA Plan, in particular the rules for exception telecasts, reveals that the true nature of the NCAA scheme is to restrict output and suppress competition.

The NCAA Plan, by granting virtually exclusive rights to the ABC, CBS and Turner networks to televise college football, restricts output by foreclosing in most instances the purchase by other broadcasters of rights to televise games not chosen by those networks, even if all schools involved are willing to have their games broadcast. Under Article 16 of the 1982-85 NCAA Plan, an exception telecast (outside of the network series) can generally be presented in the home team's television market only if the game is sold out, and in the visiting team's television market only if the game is sold out or played more than 400 miles away from home. Even if these requirements are met, exception telecasts are allowed only if no "appreciable damage" will be done to a conflicting game. "Appreciable damage" to a conflicting game is presumed if a non-sellout game is scheduled within three hours of the "exception" game in a 120 mile radius of a VHF television station presenting the game or a 45 mile radius of a UHF station.[4] In addition, "appreciable damage" can be created from retransmission of a broadcast signal by cable systems, regardless of whether the playing school or the broadcaster has any power to stop it. The Plan explicitly reserves to NCAA all power to determine when "appreciable damage" may occur, stating that its Television Committee "will not accept declarations of lack of

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[4] There are other "special exception" provisions for Division I schools, but during 1981 only four games were telecast under those provisions, so their effect in permitting telecasts must be regarded as *de minimis*. Report of the 1981 NCAA Football Television Committee 50-51 (January 1982) [hereinafter 1981 NCAA Report], J.A. 228-231.

attendance damage by the institutions participating in a conflicting game." 1982-85 NCAA Football Television Plan 50; J.A. 71.

The record establishes that the exception telecast limitations effectively prevent individual colleges and television stations from presenting many college football games. As an initial matter, "exception" games are virtually limited to a college's home market. Thus, only Austin stations in Texas could present University of Texas games unless the competing school also came from Texas. For other schools, the sellout requirement bars televising of local games. For example, USC almost never sells out its stadium which seats almost 100,000 fans. Even though USC would permit television coverage of its games, the NCAA forbids it. J.A. 581-82 (testimony of John Mohr). Altogether, only 65 telecasts were permitted in 1981 under the two major "exception" rules. 1981 NCAA Report, J.A. 228-231. There can be no doubt, therefore, that the NCAA rules inhibit the sale of television rights for college football games, largely restricting telecasts of live college football to the NCAA series games on network television.

The restriction of output crucial to the NCAA Plan distinguishes it from the licensing arrangements considered in *BMI*. Although NCAA strictly limits the number of games which may be televised and the number of television appearances which a school may have, *BMI* in no way limited the number of compositions which could be created and played or the number of times any composition could be used. Thus, while *BMI's* arrangements did set a blanket price for all compositions, there was no effort to depress total output or to restrict competition; while *BMI* sought to maximize the use of its members' product, the NCAA Plan artificially restricts use of its members' product.

C. The NCAA Plan Forecloses the Networks' Only Competitors from a Unique Product Market and Extends the Dominance of the Major Networks.

NCAA defends its plan in part on the ground that the particular networks support it (Br. Pet. 47, 48). Of course they do. The NCAA forecloses the networks' only competitors from access to a unique and desirable product, live college football. In none of the long-term contract cases NCAA cites (NCAA Br. 47) was a unique product, such as live college football, tied up.

A joint venturer (assuming that is what NCAA is) which controls a scarce resource or unique product has a duty to provide all competitor purchasers with access to the scarce product. *United States* v. *Terminal Railroad Association*, 224 U.S. 383 (1912); *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973); *American Federation of Tobacco Growers* v. *Neal*, 183 F.2d 869 (4th Cir. 1950); *Gamco, Inc.* v. *Providence Fruit & Produce Building*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *United States* v. *Krasnov*, 143 F.Supp. 184 (E.D.Pa. 1956), *aff'd per curiam*, 355 U.S. 5 (1957).

Arrangements such as the NCAA Plan are lawful only where, as in *BMI*, true alternatives under the Plan are available to competitive purchasers.

D. There Is No Necessary or Logical Relationship Between NCAA's Stated Justifications and the Plan's Restrictions.

NCAA argues that its restrictions are essential to the sale of college football television rights. Both courts below, however, correctly found that none were adequate to justify the NCAA Plan's gross restriction of competition.

NCAA asserts that the limits on the number of series games and the restriction of "exception" games to situa-

tions where all local games (regardless of whether the schools involved are NCAA members) are sold out are necessary to promote live attendance at college games. Both the Television Plan itself and the attendance records of NCAA schools belie this assertion. In contrast to the overwhelming care taken through television blackouts for the stated purpose of preserving attendance when exception telecasts are at issue, the NCAA Plan *prohibits* blackouts of NCAA network series games "in the area in which the game is played," without regard to whether the game being televised or any other area game is sold out. Moreover, the mileage rules for determining "appreciable damage" from exception telecasts far exceed the normal propagation of a television signal, and the NCAA enforces its ban on televising other games even if all schools within the "appreciable damage" area waive objections to a telecast. It is clear from these facts that the NCAA is not motivated to adopt these restrictions by any concern with preserving attendance at local games, but is actually bent on minimizing the number of exception telecasts competing with the NCAA-network series of games.

Furthermore, there is no basis for NCAA's concern over the effect of television on game attendance in view of the fact that while the number of televised NCAA games has been increasing, attendance at college football games has increased in all but one of the 28 seasons from 1954-81. 1981 NCAA Report J.A. 235; *see* J.A. 514-16 (testimony of James Koch). NCAA's "concern" is illusory, since under the Television Plan, college football is televised on the networks every Saturday during the football season. The effect of the Plan is not to "preserve" live attendance from television competition, but to foreclose competition within the market of televised games. If the NCAA restrictions were removed, any college which feared an adverse impact on attendance could re-

fuse to have its games broadcast. Thus, the interests of individual colleges would be better protected in the absence of the NCAA Plan.

NCAA's "on-the-field balance" justification (NCAA Br. 20) proves the correctness of the lower courts' findings. NCAA acknowledges:

> . . . the increase in the number of teams shown on national or regional broadcasts puts the teams on more competitive footing in recruiting new players and financing their programs (NCAA Br. 20).

NCAA's Television Plan, however, restricts output and reduces the number of televised football games. The Plan thereby adversely affects the very increase in exposure of college football teams that NCAA recognizes is financially healthy and pro-competitive. On the evidence before it, the District Court found that "many more games would have been broadcast locally" were it not for the NCAA Plan (D.C. 59a).

NCAA also asserts that its Television Plan is necessary to promote "brand identification" so that the networks can promote NCAA football as a series. NCAA Br. at 22-25. There is no reason why a network which desired to promote a series of college games could not on its own negotiate for a number of games and then promote them as a package, even as "NCAA Football" if the NCAA wished to license the use of its name. NCAA's claim that its Television Plan is essential to college football must also be viewed in light of the absence of similar restrictive practices for college basketball—an absence which has had no apparent deleterious effect on either college basketball or the NCAA (D.C. 47a-48a).

Contrary to NCAA's arguments, therefore, the restrictions on output inherent in the Television Plan are not essential or even rationally connected to the promotion and sale of television rights for college football or the avowed beneficent purposes of the NCAA. Instead, their only purpose appears to be to restrict the output of col-

lege football television rights, depriving broadcasters other than NCAA's contractual partners of access to this valuable market. Restrictions which decrease competition, as NCAA's certainly do, and are not shown to be essential to the conduct of the business in question cannot be deemed reasonable. *See White Motor Co.* v. *United States*, 372 U.S. 253, 273 (1963) (Brennan, J., concurring); Louis, *supra* p. 10, at 883.

CONCLUSION

The NCAA Plan has one purpose and effect: to artificially restrict the output of live television broadcasts of college football. The restrictions have no necessary or even logical relationship to their stated justifications.

Unless colleges are to be given an exemption from the antitrust laws now enjoyed by no other professional group, including doctors and lawyers, the decision of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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No. 83-271

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA, a Public Body Corporate, and THE UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION, a Non-Profit Corporation,
Respondents.

BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS IN SUPPORT OF PETITIONER

The amicus curiae National Federation of State High School Associations ("National Federation"), by its attorneys, Caplan and Earnest, submits the following Brief in the above-captioned action.

THE INTEREST OF THE AMICUS CURIAE

This Brief is submitted in support of the Petitioner, National Collegiate Athletic Association ("NCAA").

The National Federation is a voluntary association whose membership includes the state high school activities associations of the fifty states and the District of Columbia and their counterparts in the ten provinces of Canada, the Phillipine Islands, Guam, Okinawa and the Virgin Islands. Through its

members, the National Federation represents the interests of some 18,000 public and private high schools in the United States and 2,200 high schools of the other members. The total number of students within these schools is about 12,660,000. The athletic and academic events sponsored by the member associations of the National Federation draw some 1.2 billion spectators annually.

The basic purposes of the National Federation, as stated in Article II of its Constitution, are as follows:

> The object of this Federation shall be to serve, protect and enhance the interstate activity interests of the high schools belonging to the state associations, to assist in those activities of the state associations which can best be operated on a nationwide scale, to sponsor meetings, publications and activities which will permit each state association to profit by the experience of all other member associations and to coordinate the work so duplication will be minimized. [Footnote omitted.]

In furtherance of these purposes, the National Federation represents the interests of the high schools before the United States Congress, the United States Olympic Committee, all major national amateur sports governing bodies and national education associations. In short, the National Federation serves as the voice of the athletic interests of the nation's high schools and can be characterized as the "NCAA" of high school sports.

While the function of the National Federation and its member associations includes all interscholastic sports and academic competitions, such as speech and music, its particular interest in this action is interscholastic football. There are some 15,061 high schools which compete in interscholastic football sponsored by members of the National Federation, and just under one million high school football players.

Every Friday night beginning in September and continuing into December of each year, literally thousands of organized interscholastic football games are played across the United States. These games are conducted by the high schools as an

extracurricular activity within their educational programs. This is a tradition which has existed in many locales for over a half century. Local high school football games are an unparalleled community event, particularly in the smaller cities and towns and in rural areas. Likewise, for hundreds of thousands of young people, high school football is the athletic experience of a lifetime. Moreover, high school football is a special revenue source for the schools. Football is one of the few, and often the only, high school extracurricular activities which not only pays for itself but supports other activities.

Thus, to the extent, discussed further hereinafter, that the ruling of the Tenth Circuit Court of Appeals in this action threatens the continuing viability of high school football, it threatens even more the broad spectrum of other interscholastic competitions that compose the extracurricular activities of the 20,200 high schools represented by the National Federation.

The Court of Appeals adopted the premise that intercollegiate football and the sale of telecasting rights therein is strictly a business and, like any business, is and should be dominated by the purpose to maximize revenues. The holding that the NCAA telecasting controls violate the Sherman Antitrust Act, 15 U.S.C. §1, and are illegal result from this initial premise. The culmination is the order prohibiting the NCAA from exercising regulatory control over its members' sale of the telecasting rights to their games and, conversely, affirming the preeminent right of a college or university to sell those rights to any entity, at its discretion.

This conclusion particularly concerns the National Federation because it exposes the high schools to the prospect of live intercollegiate football telecasts on Friday nights in direct competition with high school stadium attendance. The mandate of ungoverned college football telecasts permits and, in the

competitive atmosphere which would thereby develop, encourages collegiate encroachment upon high school football night. While the Court of Appeals has mitigated this risk, at least theoretically, by holding that restriction of collegiate football telecasts on Friday nights is not within the violations found, the National Federation can only perceive the situation as extremely threatening.

The result would be devastating for high schools. As public or nonprofit institutions, every spectator dollar received by the high schools goes back into program. Even a marginal loss due to the broader appeal of televised college games can only damage the educational programs provided to the nation's school children. And the threat of greater losses is undeniable.

While the financial interest of the National Federation is the more easily described element of concern, it is neither the only nor the predominant one. The National Federation, like the NCAA, is dedicated to the concept that scholastic, amateur athletics are and should be integrated with the larger educational purposes to which the high schools, colleges and universities are devoted. High school and collegiate athletics *are* different from the "strictly business" approach of, for example, professional football. Both the National Federation and the NCAA extend the greatest attention to the maintenance of standards of amateurism, broad participation by students through varied athletic programs at member institutions and enforcement of academic eligibility requirements. This is not a "business" policy but an educational policy—and one which the majority of the Court of Appeals ignored entirely.

For these reasons, the National Federation has sought leave to appear as an amicus curiae supporting the NCAA regulations in issue.

SUMMARY OF ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NCAA TELEVISION PLAN IS UNLAWFUL PER SE UNDER THE SHERMAN ACT.

Per se treatment under the antitrust laws is appropriate only when the courts have considerable experience with the restraint in question and it has been found to be manifestly anticompetitive. The NCAA television plan exists within a unique context predominantly oriented toward maintenance of educational quality and amateur athletic integrity. To judge this agreement by standards developed in a purely commercial context is erroneous.

The NCAA television plan enhances competition by maintaining a necessary athletic balance among its member institutions. Such balance is an economic necessity in the particular context of athletic team competition. Moreover, by limiting commercial competition for revenues and distributing both television income and exposure, the television plan preserves the larger athletic programs of its members and prevents commercialization destructive of amateur athletics. These are both economic and educational virtues the consideration of which precludes per se antitrust treatment.

II. NCAA REGULATION OF TELECASTING OF INTERCOLLEGIATE FOOTBALL IS REASONABLE AND BENEFICIAL.

Intercollegiate football operates within a larger market which includes professional and interscholastic football. These three participants are interdependent, and cooperative allocation of their market is mutually beneficial. Direct competition of NCAA telecasts and high school football games on Friday nights would be disastrous to the high schools, to the detriment of the NCAA members.

The NCAA television plan prevents this danger by precluding Friday night college football telecasts. This benefits the public at large which has a compelling interest in the education system. Such regulation is reasonable and should be preserved. The perception of intercollegiate football as a purely commercial venture to be governed as a matter of law by a principle of unregulated competition misperceives the totality of the interests involved and directly threatens the athletic programs not only of the colleges and universities, but of the nation's high schools as well.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE NCAA TELEVISION PLAN IS UNLAWFUL PER SE UNDER THE SHERMAN ACT.

As an amicus curiae, the National Federation anticipates that the NCAA will more fully brief the specific antitrust issues involved in this action. It is our more general purpose to argue first that under all of the circumstances the Court of Appeals erred in holding the NCAA television plan unlawful per se under the Sherman Act, but that the "rule of reason" analysis should be employed. Thereafter, we set forth the justifications for the television plan in the context of the larger competitive football market, with particular emphasis on the concerns of high school athletics.

It is familiar law that although Section 1 of the Sherman Act literally prohibits "every contract, combination... or conspiracy, in restraint of trade or commerce," this Court early established the rule of reason as the prevailing standard of review. *Standard Oil Co. v. United States,* 221 U.S. 1 (1911). Over time, certain exceptions to the otherwise necessary rule of reason analysis developed as the Court identified forms of business conduct which were "manifestly anticompetitive" and, therefore, unlawful per se. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36 (1977).

Per se antitrust violations are limited to those:

> [A]greements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958).

The application of per se treatment constitutes an inflexible judicial conclusion as to the social utility, under any circum-

stances, of a particular practice, foreclosing the possibility of justification. *See, Continental T.V., Inc. v. GTE Sylvania Inc., supra,* at 49, n. 15; *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332 (1982). Therefore, a per se rule is not applied until the courts have gained considerable experience with the challenged restraint and have found it to have no purpose except stifling of competition. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 444 U.S. 1 (1979) ("*Broadcast Music*"); *White Motor Co. v. United States,* 372 U.S. 253 (1963).

A. The NCAA Is Not a True Commercial Enterprise.

The majority of the Court of Appeals presumed, without a thorough discussion, that the context within which the NCAA television plan operates does not distinguish it from the strictly commercial enterprises within which the per se rule was developed. As Judge Barrett noted in dissent, this failure to consider the NCAA's unique function as an association of educational institutions is fundamentally unsound.

This Court has recognized that in determining the appropriateness of per se treatment, special aspects of the area of commerce involved, such as public service or comparable features, are pertinent. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 778, n. 17 (1975). Such features can and do make it unrealistic to categorize the NCAA's activities with those of an unalloyed commercial nature.

Every other court of the few which have scrutinized the NCAA television plan under the antitrust laws has acknowledged the existence of special considerations:

> [A] practice that would be declared invalid per se if it occurred in a purely commercial context should not be subject to a per se rule in the context of singularly commercial and educational activities with which no court has had considerable experience.

Warner Amex Cable Communications, Inc. v. American Broadcasting Companies, Inc., 499 F. Supp. 537, 545 (S.D. Ohio 1980). *See also, Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977); *Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla. 1977).

That the purposes of the NCAA are indeed a mixture of the commercial and educational, with an ultimate reference to the latter, is unequivocal. They are plainly stated in the "Principles" for football television activities adopted for the years 1982 and 1983 under which the challenged contracts were negotiated.

> The purposes of the program and any detailed plan or agreements devised thereunder shall be to *reduce* insofar as possible *the adverse effects of television in its various forms upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom;* to spread football television participation among as many colleges as practicable; to *reflect properly the image of universities as educational institutions;* to promote college football through the use of television; to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives.

Plaintiffs' Exhibit 79 [emphasis added].

It should be obvious that the NCAA operates within an area of commerce characterized by more than a commercial or "strictly business" perspective. The overriding concern of the NCAA, its reason for existence, is not to profit but to further the educational purposes of its membership. Thus, the "Fundamental Policy" stated in the NCAA Constitution is as follows:

> The competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to *maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body* and, by so doing, retain a clear line of demarcation between college athletics and professional sports.

1982-83 NCAA Manual, Plaintiffs' Exhibit 1-A [emphasis added].

This is scarcely the mandate of a commercial venture. On the contrary, it states a basic purpose to preserve educational values and amateurism, as opposed to professionalism, in the face of potential commercialization. Appropriately, the colleges and universities have joined together in their intercollegiate sports association to affirm and mutually enforce their foremost interest, educational quality. Application of per se antitrust law developed in purely commercial contexts to the NCAA would perpetrate a gross disservice upon the educational institutions.

This was recognized by the Fifth Circuit Court of Appeals in *Hennessey v. National Collegiate Athletic Ass'n, supra,* at 1152, where it stated, in the context of a group boycott claim, that:

> While this court has declined to grant the NCAA and its members a total exemption from the antitrust laws, it does believe that, *given the nature and purposes of the NCAA and its member institutions,* this particular restraint...is not a *per se* violation of the antitrust laws. [Emphasis added.]

Accord, Board of Regents of Univ. of Okla. v. National Collegiate Athletic Ass'n, supra, at 505-06.

In its opinion, the Court of Appeals has subjugated the NCAA's educational goals entirely to the commercial aspect of athletics telecasting. This is a fundamental misperception. Most unfortunately, it is the sort of error which threatens to be self-fulfilling. By presuming that college football is fundamentally a business enterprise, the Court forces that conclusion upon the member institutions of the NCAA, contrary to their larger purposes, subverting decades of effort to preserve the educational and amateur integrity of college sports.

From this basic error follows the entirely unwarranted legal conclusion that the NCAA television plan, merely one aspect of its greater function, is a restraint of trade sufficiently

familiar to require invalidation on a per se basis. This conclusion and the analysis dependent thereon should be rejected by this Court.

B. The NCAA Television Plan Enhances Competition by Maintaining Balance Among its Members' Teams and Their Larger Educational Programs and Advances the Interests of Educational and Amateur Integrity.

Without describing the NCAA television plan in depth, it functions by aggregating the games of the member institutions for sale as a package and allocates, to an extent, the benefits of the income and the television exposure among those members by setting telecasting conditions.

The Court of Appeals found that the NCAA television plan constituted "price fixing" and was unlawful per se. While price fixing is among those practices characterized as per se violations, *United States v. Trenton Potteries*, 273 U.S. 392 (1927), the term itself is merely a shorthand description of certain forms of business behavior which have been found to fall within the larger category of per se unreasonable restraints of trade. As such, a literal application of the term to every agreement among potential competitors to fix a price for their product is "overly simplistic and often overbroad," for not every agreement which fixes a price is conclusively anticompetitive and without redeeming value. *Broadcast Music, supra*, at 8-9.

Thus, before an agreement like the NCAA television plan is labeled "per se price fixing" some inquiry, short of full blown rule of reason analysis, must be made to determine:

> [W]hether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic

> efficiency and render markets more, rather than less, competitive."

Id., at 19-20 [footnote and citations omitted].

The NCAA has advanced several justifications for its television plan. Among these, the concept of maintenance of athletic balance was rejected by the Court of Appeals as a "noneconomic justification." In so doing, the Court entirely ignored the unique quality of sports league competition and the larger role which the significant revenues from the popularity of intercollegiate football play in the maintenance of college sports generally. Two genuinely economic factors are involved—the maintenance of balanced football competition and the preservation of the athletic curricula of the member schools.

Sports leagues are peculiar in themselves with respect to interteam business competition. Each team in any league requires the coexistence of athletically competitive opponent teams or the league degenerates, to the ultimate loss of every team. Professional football is an excellent comparison:

> *Professional football is a unique type of business.* Like other professional sports which are organized on a league basis *it has problems which no other business has.* The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.
>
> *Professional teams in a league,* however, *must not compete too well with each other in a business way.* On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker

> teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.
>
> • • •
>
> *The member clubs of the National Football League, like those of any professional athletic league, can exist only as long as the league exists. The League is truly a unique business enterprise,* which is entitled to protect its very existence by agreeing to reasonable restrictions on its member clubs.

United States v. National Football League, 116 F. Supp. 319, 323, 326 (E.D. Pa. 1953) [emphasis added]. *See also, Bridge Corp. of America v. American Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970); *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir. 1966) (rule of reason applied to "group boycotts" intended to preserve fair competition).

This same consideration, to preserve the entire system of commerce and competition among the members thereof by regulating business competition between the members, is present in the NCAA.

> A goal of the NCAA, one which is endowed with certain benefits to society, is to "retain a clear line of demarcation between college athletics and professional sports." *Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics.* Financial pressures upon many members, not merely to "catch up," but to "keep up," were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers," such as varsity football and basketball.
>
> [The NCAA regulation in question] was, with other rules adopted at the same time, intended to be an "economy measure." In this sense it was both in design and effect one

> having commercial impact. But *the fundamental objective in mind was to preserve and foster competition* in intercollegiate athletics—by curtailing, as it were, potentially monopolistic practices by the more powerful—*and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes.*

Hennessey v. National Collegiate Athletic Ass'n, supra, at 1153 [emphasis added].

The *Hennessey* case summarizes well the reasons why the antitrust rule of reason is necessary in this case. Both educational and commercial purposes require that the NCAA regulate the competition for telecasting revenues among its members. Uncontrolled competition for revenues distorts the function of athletics in an educational program. Among the successful, such competition threatens to elevate a portion of the educational program to an unhealthy predominance over all others. Among the unsuccessful, the threat is to their financial ability to continue a broad athletic program for many students and to maintain the athletic aspect of the schools' curricula. Furthermore, such competition endangers the system within which athletics as a purely commercial endeavor take place. Domination by a few at the expense of all others destroys the system within which all operate and upon which all rely. From both perspectives, the conclusion that the NCAA television plan lacks any redeeming virtue and is plainly anticompetitive is unsupportable.

II. NCAA REGULATION OF TELECASTING OF INTERCOLLEGIATE FOOTBALL IS REASONABLE AND BENEFICIAL.

Justice Brandeis described the nature of the antitrust rule of reason analysis in *Board of Trade of City of Chicago v. United States,* 246 U.S. 231, 238 (1918):

> *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even*

> *destroy competition.* To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restrain, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. [Emphasis added.]

The particular aspect of the larger football market within which the NCAA telecast controls operate which is of special importance to the National Federation is that it includes three major participating systems—professional, intercollegiate and interscholastic football. Each of these systems is interrelated by mutual interest. The colleges draw their talent from the high schools, *see* Testimony of Brice Durbin, Transcript at 1106, ff. 6-11, and the professionals draw their talent from the colleges. While the three systems share an overlapping audience and can, therefore, be perceived as competitors in one sense, the prosperity of each is beneficial to all three and to the public interest.

This unusual condition has brought about a cooperative allocation of audience time between the systems whereby the high schools play on Friday nights, the colleges on Saturdays and the professionals on Sundays during their regular seasons. In this manner, no system encroaches upon the others through contemporaneous telecasts of games which would draw upon their common audience. In many ways, high school football, which neither has nor is likely to develop a significant television audience and is solely dependent on stadium attendance for income, is the greatest beneficiary of this arrangement.

With respect to professional football, the division of days is codified in the Professional Sports Telecasting Act, 15 U.S.C.

§§1291 *et seq.* By that Act, Congress exempted professional football, and other professional sports leagues, from the antitrust laws for league sales of the telecast rights of members' games. The exemption is limited by 15 U.S.C. §1293 which removes the antitrust protection for all contracts of sale which permit telecasts of professional football games on Friday nights or Saturdays in conflict with high school or college games.

The effect of this exception is to preclude professional football telecasts on Fridays and Saturdays and, thereby, to protect interscholastic and intercollegiate football. The Senate Committee on the Judiciary, in its report on S. 3817, the bill which amended the Act in 1966, stated its purpose as follows:

> The proposed legislation also extends to high schools the same protection from the telecasting of professional football games that has already been accorded to the colleges. That protection prohibits the telecasting of a professional football game from a telecasting station located within 75 miles of the game site of a college or high school game. The protection extends from 6 o'clock p.m. on the second Friday in September until the second Saturday in December.
>
> * * *
>
> The committee views the *practice of telecasting professional football games at those times traditionally used for the playing of high school and college games as a serious threat to the scholastic athletic programs.* The committee intends to maintain a close scrutiny on this practice with a view of determining at a later date whether further legislation is necessary to circumscribe such a practice.

Hearings before the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, Eighty-Ninth Congress, Second Session, on S.3817 (1966), at 5-6 [emphasis added] (hereinafter "*Antitrust Hearings*").

Of course, competing intercollegiate football telecasts on Friday nights would have the same adverse effect on the high

schools. Testimony of Brice Durbin, Transcript at 1107, ff. 16-25; 1108, ff. 1-16; 1109, ff. 12-16; 1110, ff. 5-22. The NCAA has consistently provided telecast protection to the high schools on a cooperative basis. *Id.*, at 1106, ff. 19-25; 1107, ff. 1-6. The 1982-1985 NCAA Football Television Plan specifies that other than on the special Friday following the Thanksgiving holiday, games offered for telecast through the Plan will be held on Saturdays. The Plan permits Friday night telecasts only where no appreciable damage will be done to a conflicting high school game by the telecast. Defendant's Exhibit LT.

This NCAA rule does restrict the ability of its members freely to sell the telecast rights to their games. In a system of open competition for television dollars, the colleges would be financially compelled to override the reservation of Friday nights for the high schools. The loss of Friday nights would end the viability of high school football. Representative Robert L. Leggett, a cosponsor of the 1966 amendment to the Professional Sports Telecasting Act, spoke to this issue in the related context of professional football telecasts:

> It is imperative that the High Schools of America be protected on Friday nights against Professional Football. The television [sic] of Professional Football games on these nights will have a severe, adverse effect on High School football games.
>
> In order to meet the cost of having a creditable football and athletic program, the high schools have traditionally held their games on Friday evenings. In many of the smaller communities the Friday night football game is the unifying social function of all the residents of the area.
>
> If High School football had to compete against televised Professional Football games, the gate receipts, upon which most schools rely for carrying on their athletic programs would be seriously in danger. Such a practice would, I fear, prove disastrous to High School football in this country.

Antitrust Hearings, supra, at 108.

Just as the NCAA is properly concerned with the destructive effects of unbridled, commercial competition for television contracts within its membership, so its cooperative protection of high school football from the same danger is appropriate in light of the larger interests of scholastic athletics. Healthy high school competition stimulates and enhances intercollegiate competition. The two share a symbiotic relationship—their mutual strength exceeds their separate strengths. The ultimate beneficiaries are the student athletes, spectators, educators, parents and alumnae, and the general public which has a compelling interest in its education system.

The National Federation urges this Court to take the foregoing into account among the circumstances relevant to the reasonability of the NCAA television plan. High school and intercollegiate football are not and should not be forced by law and against their own desires and the public interest to become business competitors. The truth of this statement is independent of but draws great urgency from the fact that such competition would be ruinous for the high schools. The NCAA and the National Federation are partners in the national education system and cooperation is their natural and reasonable relationship. While it may not be demeaning to acknowledge a commercial element subject to antitrust review in interscholastic football, it is utterly callous to subordinate all other elements to the commercial.

Intercollegiate football is an endeavor which requires internal regulation to function. The NCAA as regulator did not impose itself upon its members. Rather, it came into existence on their initiative and in the recognition of a need. Television and the revenues and prestige made possible by national exposure created an unprecedented opportunity for the colleges, but introduced a danger which threatened the existence of the system upon which their programs depend. What the

District Court saw as a progressive "commandeering" of members' property rights is more accurately described as a gradual, principled incorporation through group action of the opportunity presented, in light of the accompanying risk.

As we have stated, this risk extends beyond the NCAA to the high school programs. Just as Congress acted to protect the colleges and high schools from professional football telecasts, so the NCAA has acted to protect the high schools from college competition through its television plan. This action should be understood as a reasonable regulation intended and functioning to promote competition within the NCAA and to maintain the integrity of the educational process at the college and high school levels. In this latter respect, the controls advance a significant public interest outside of the antitrust field but of at least equal dignity.

It is this public interest which the Court of Appeals failed to consider sufficiently but which lies at the heart of this action. The nature of the interest and the real harm threatened were ably described by Representative Grider of Tennessee speaking in support of the 1966 amendment to 15 U.S.C. §1293:

> That competitive athletics are an integral part of our educational process; that they provide a challenge which transcends mere physical ability—a challenge of the mind, of the attitude, of the spirit—cannot be denied. It is the same type of spirit which molded a nation less than two centuries ago....
>
> The basis of high school football—of all high school athletics—is spirit: The roar of enthusiasm from a hundred classmates; the unrestrained cheer of a thousand fans; or, in the words of Grantland Rice, just the "tumult and the shouting." The low, but audible, hum of approval from the grandstand provides inspiration. The skill, agility and prowess of the athlete then make him react. Inspiration and skill help to transform the young athlete into a man.
>
> The loss of the spectator means the loss of the principal source of financial support for all high school athletics.

The revenue derived from these football games pays for vast facilities for physical education and recreational athletics; it pays for football helmets, baseball bats, basketballs. The revenue that the spectator provides at a high school football game is needed. But the fan provides something far more important. He infuses spirit. The loss of the fan means the loss of sports vitality.

Today, the existence of high school football—a Friday night event in virtually every high school town in the country—is threatened by television. Professional football is scheduled to be shown on television Friday nights. Just as mass televising of major league baseball wrecked the minor leagues. So professional football is devouring its young.

112 CONG. REC. 21,311 (1966).

CONCLUSION

For the foregoing reasons, the National Federation submits that this Court should reverse the holding of the Court of Appeals and rule that the NCAA television plan is not unlawful per se under the antitrust laws. The Court should further hold that the NCAA television plan is not unlawful under appropriate rule of reason review. In the alternative and at least, the Court should hold that the injunction issued by the District Court and modified by comment of the Court of Appeals is overbroad and unnecessarily restrictive of the scope of permissible regulation which the NCAA may exercise over the telecasting of football games of its member institutions, with particular reference to the interest of high school athletics.

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
PETITIONER

v.

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

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QUESTIONS PRESENTED

The National Collegiate Athletic Association (NCAA) is a joint venture of colleges that establishes rules and regulations governing a variety of intercollegiate athletic events. Membership in the NCAA is a prerequisite for participation in a broad intercollegiate athletic program, and membership is conditioned on adherence to the organization's rules. The particular rules at issue in this case provide that the NCAA will act as the selling agent for the television rights to in-season intercollegiate football games in a manner that prevents the individual schools from selling telecasts outside of the NCAA package. The questions presented are:

1. Whether these television restrictions constitute per se illegal price fixing.

2. Whether the television restrictions violate the Sherman Act when judged under the rule of reason. This issue involves the following subsidiary questions:

a. Whether the lower courts applied the proper legal standards in requiring petitioner to show that legitimate justifications exist to outweigh the anticompetitive effects of the television restraints.

b. Whether the district court committed clear error in defining the relevant product market in which to assess the anticompetitive restraint.

c. Whether the fact that the three television networks compete for the NCAA television package negates the anticompetitive effects of the television restrictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-271

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v.

BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA AND UNIVERSITY OF GEORGIA ATHLETIC ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF THE UNITED STATES

The United States and the Federal Trade Commission, which have primary responsibility for the preservation and promotion of competition through enforcement of the federal antitrust laws, have a substantial interest in ensuring that those laws are interpreted and applied in a manner that promotes competition and consumer welfare. Because of the importance of the issues raised by this case, the United States filed an amicus brief before the Tenth Circuit. Subsequently, at Justice White's invitation, the United States filed a memorandum in this Court concerning the application for a stay (Resp. App. 1A-5A).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The National Collegiate Athletic Association (NCAA) has developed a Television Plan and Principles of Negotiation and has entered into contracts with three television networks (CBS, ABC, and Turner Broadcasting) as the sole seller of televised in-season collegiate football games (Pet. App. 44a-45a, 47a). The contracts

limit the number of times a member institution may have its games televised and effectively establish the price that each nationally and regionally televised team will receive (Pet. App. 56a, 58a, 64a; Tr. 826, 842-885, 877-878). Except for differences in payment between national and regional telecasts, the amount that a team receives does not vary with the size of the viewing audience, the number of markets in which the game is broadcast, or the popularity or caliber of the teams (Pet. App. 7a & n.5, 60a; Tr. 86-96, 100, 104, 106). In addition, the NCAA prohibits its members from independently negotiating for broadcast of individual games; violations of this rule subject member institutions to sanctions such as expulsion from the organization and bans against appearing on television in a game against another NCAA member (Pet. App. 28a-29a; Tr. 15-16, 54, 115).[1]

Both the district court and the court of appeals held that this television plan is a per se violation of the Sherman Act. Alternatively, both courts also found that the conduct is unlawful under the rule of reason.

2. In order properly to assess the conduct at issue, it is necessary to understand the role of the per se standard in antitrust analysis. The ultimate question in any case of concerted action is whether the conduct unreasonably restrains competition. And the usual mode of evaluation is the rule of reason. The Court has, however, recognized that certain forms of behavior are so inherently anticompetitive that, after the courts have sufficient experience with them, they are deemed unreasonable per se and subject to condemnation without extended inquiry into their purpose or competitive effect. Other forms of conduct, while facially suspect, may in fact promote competition and thus require additional scrutiny to see if their purported economic justifications outweigh the potential for competitive harm.

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[1] While agreements covering the telecasting of some professional sports are exempt from the antitrust laws (15 U.S.C. 1291 *et seq.*), Congress has created no such immunity for college football.

The conduct at issue in this case is not of a type with which the courts have had substantial experience and does not involve a naked restraint imposed by competitors who have no legitimate cooperative relationship with one another. Accordingly, per se condemnation is not warranted.

3. The conclusion that the NCAA's conduct is not unreasonable per se does not end the case. Rather, the televison arrangements must be evaluated to determine whether the asserted justifications may excuse the facially suspect impact on price and output their restrictions entail. This inquiry need not, however, involve "full-blown" scrutiny of all aspects of the conduct. The rule of reason is a flexible standard that can be fitted to the conduct and defense justifications in particular cases. Just as the Court has established an abbreviated analysis of reasonableness under the per se standard, a similar, but less truncated, version of the rule of reason may suffice where the justifications presented, although plausible, are rejected after further scrutiny.

4. Both lower courts addressed petitioner's proffered defenses and concluded that the conduct constituted an unreasonable restraint of trade. The factual findings upon which this conclusion is based are not clearly erroneous and, in our view, provide a sufficient foundation for holding that Section 1 of the Sherman Act, 15 U.S.C. 1, has been violated. Petitioner's defenses include claims that (1) the television restrictions are necessary to maintain competitive balance between teams; (2) uncontrolled telecasting would reduce live attendance at football games; and (3) competition is preserved because networks bid for the rights to televise an NCAA football "package." As we discuss, however, these arguments are unsupported by the record.

Based on the lower courts' findings of fact, there was ample basis for concluding that any benefits flowing from the television arrangements did not outweigh their anti-competitive effects. Accordingly, it was correct to hold that the NCAA's conduct unreasonably restrained trade, and the court of appeals' judgment should be affirmed on that basis.

ARGUMENT

I. THE NCAA TV RULES DO NOT CONSTITUTE PER SE ILLEGAL PRICE FIXING

A. The Role of the Per Se Standard in Antitrust Analysis

1. Although Section 1 of the Sherman Act, 15 U.S.C. 1, literally prohibits every agreement in restraint of trade, from the earliest cases this Court recognized that Congress could not have intended that the fullest scope be given to this language, for every business contract or agreement, to some extent, restrains trade. See, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911); *United States* v. *Joint Traffic Ass'n*, 171 U.S. 505, 568 (1898). Accordingly, this Court has long held that the Sherman Act precludes only those restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co.* v. *United States*, 221 U.S. at 58; accord, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The unreasonableness of a restraint of trade must be established by either (1) evidence that the restraint is anticompetitive in the circumstances of the case (the rule of reason), or (2) a conclusive presumption of unreasonableness based on the general character of the challenged conduct (the per se rule). See *Professional Engineers*, 435 U.S. at 687-692; *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977); *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). The rule of reason is the usual test of the legality of a restraint; the per se rule is employed only in those limited circumstances where courts, on the basis of considerable experience with the type of conduct challenged, have concluded that such conduct has a "pernicious effect on competition and * * * lack[s] * * * any redeeming virtue." *Northern Pacific Ry.*, 356 U.S. at 5; see *Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 8 (1979).[2]

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[2] The per se rule has been described as, in effect, "a special case of the rule of reason analysis." L. Sullivan, *Antitrust* 196 (1977); see *Professional Engineers*, 435 U.S. at 692; R. Bork, *The Antitrust Paradox* 18 (1978). The ultimate question—whether a restraint is unreasonable—remains the same whether it is answered

In either event, "the purpose of the analysis is to form a judgment about the competitive significance" of the alleged restraint. *Professional Engineers*, 435 U.S. at 692.

Certain types of conduct, such as horizontal price-fixing or group boycotts,[3] are deemed to be naked restraints on competition that are inherently likely to enhance price or restrict output, while offering no competitive benefits. These restraints are, accordingly, regarded as illegal per se. But the availability of this label does not obviate the task of determining whether particular practices that may affect price or exclude competitors should be viewed as conduct of the type subject to automatic condemnation. For example, not all concerted conduct that may affect price has been deemed price fixing. See, *e.g.*, *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U.S. 588 (1925); *Joint Traffic*, 171 U.S. at 567-568.[4] Indeed, this Court has held that the mere fact that two parties have "literally" fixed the price of goods they sell does not neces-

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by a conclusive presumption or by particularized evidence of effect on competition. Thus, the labels "per se" and "rule of reason" refer to the extent of scrutiny required to decide particular cases based on judicial experience with the conduct at issue and its potential for anticompetitive results. See, *e.g.*, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 179 (1911).

[3] On several occasions this Court has stated that group boycotts are per se illegal (see *e.g.*, *Northern Pacific Ry.*, 356 U.S. at 5, and cases cited therein). Nevertheless, not all cases that could be characterized as group boycotts have been struck down on this basis. Rather, the per se rule has been applied only to narrower classes of concerted exclusionary activities whose clearly pernicious market effects warrant automatic condemnation (see L. Sullivan, *supra*, § 90). The classic boycott to which the courts have applied the per se rule "constitute[s] efforts by a firm or firms at one level to drive out competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" (*id.* § 92, at 261-262).

[4] Thus, the legality of information exchanges and product standardization practices has been examined under the rule of reason because of judicial recognition that such practices have significant procompetitive potential in certain circumstances. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563 (1925); *cf. United States* v. *Container Corp. of America*, 393 U.S. 333 (1969).

sarily result in a finding of per se illegality. *Broadcast Music*, 441 U.S. at 9. To determine whether the challenged conduct is properly characterized as "per se price fixing" (*id.* at 19-20 (footnote omitted; citation omitted)):

> [the] inquiry must focus on whether the effect and * * * the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output * * *, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

Accordingly, when defendants proffer plausible justification for a horizontal combination, claiming that the arrangement as a whole " 'increase[s] * * * efficiency and render[s] markets more, rather than less, competitive' " (*id.* at 20 (citation omitted)), the mere fact that prices are in some sense "fixed" or that competitors may be excluded[5] does not automatically resolve the question of legality under the Sherman Act.

2. The terminology of "per se" and "rule of reason" analysis has led to a common misconception: that conduct necessarily falls either into the category subject to automatic condemnation or into the category where all aspects of the conduct and its context (*e.g.*, market definition, market power, intent, and competitive effect) must be exhaustively scrutinized before its legality can be determined. The polarity of this approach has led to un-

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[5] Many membership organizations attempt to regulate certain aspects of the behavior of their members through the sanction of expulsion. The courts, however, have never held that a group's authority to expel its members renders the group structure tantamount to a group boycott and thus per se unlawful. The expulsion sanction is merely an enforcement vehicle for the underlying rules and policies of the group. Thus, the important issue is the competitive reasonableness of the underlying rules (here, the NCAA's television controls), not the existence of sanctions for their violation. See, *e.g.*, *Molinas* v. *NBA*, 190 F. Supp. 241, 243-244 (S.D.N.Y. 1961); See also R. Posner, *Antitrust Law: An Economic Perspective* (1976).

fortunate consequences. Rule of reason cases have tended to become mired in laborious and time-consuming efforts to quantify and evaluate conduct. As a result, such cases have become needlessly protracted. The drain on judicial resources this entails creates a countervailing pressure in the lower courts to avoid that analysis by fitting into the narrow per se category all conduct that could conceivably be characterized as such. The danger in those instances is that conduct that is, or may be, procompetitive will categorically be barred, to the detriment of consumers and the economy.

It is our submission that antitrust analysis is not restricted to these two extremes, a per se category that precludes an examination of actual effects, and an elaborate, "full-blown" category that requires precise measurement of markets and market power. Rather, as this Court's decisions in *Broadcast Music* and *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332 (1982), suggest, there is some middle ground in the continuum of antitrust analysis. Often a restraint can escape per se condemnation and yet be judged unreasonable without a full evaluation of its precise effects in the marketplace. For example, the market power of a combination may be so obvious that no elaborate evaluation is needed and rule of reason analysis may therefore be "truncated." [6]

Similarly, where conduct is facially suspect because it tends to restrict the output of collaborators by its very nature, and a limited examination of the proffered justifi-

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[6] L. Sullivan, *supra*, at 192; see P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center June 1981) (*Areeda Monograph*); see generally *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *American Medical Ass'n*, 94 F.T.C. 701 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982).

The abbreviated rule of reason inquiry we describe in this brief is merely an application of this Court's own recognition that certain conduct may be held to be unreasonable in the absence of minute scrutiny. By carving out a "per se" category for restraints conclusively presumed to be unreasonable, the Court has approved an inquiry far more truncated than what we propose here. See note 2, *supra*.

cation indicates that it will produce little or no procompetitive effect, there is no need for a searching inquiry into likely or actual competitive effects. The "weighing" of competitive effects is simplified greatly—with no expected procompetitive effect to balance against the inherent anticompetitive effects, the restraint can be held to be unreasonable without precise measurement of its probable harm to competition.[7] In such a situation, it would be an unnecessary waste of judicial and private resources to require the plaintiff to prove the precise nature and amount of competitive injury.

As Professor Areeda has aptly noted (*Areeda Monograph* 37):

> That something is not unlawful per se does not always require refined fact finding or balancing; indeed, a particular defense may be rejected categorically or presumptively within the general ambit of a rule of reason.

The rule of reason does not, then, always require an elaborate and precise measurement of harm; in fact, it "can sometimes be applied in the twinkling of an eye" (*id.* at 38).[8]

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[7] Judge Bork has explained why inherently suspect conduct should be summarily condemned once it is clear that no efficiency will result from the challenged restraint (R. Bork, *supra*, at 369):

> There being no possibility of efficiency, nothing is lost to society by outlawing the agreement. If these parties were allowed to prove lack of market power, * * * [a] cartel in the steel industry could not be declared unlawful without a trial on the cross-elasticities of demand between steel, aluminum, copper, cement, wood, and so on. There would be no net gain from such trials. In fact, the only result would be to make the prosecution of output-restricting cartels much more difficult, rendering the law less effective.

Once a proffered efficiency justification is rejected, Judge Bork would call the restraint "naked" and therefore per se illegal. Although we believe it is more precise to say that a truncated form of rule of reason analysis is being applied, the economic and policy analysis is identical whatever label is used.

[8] The Federal Trade Commission has also recognized that "the contours of the analysis required under the rule of reason will vary somewhat depending upon the nature of the restraint." *Ameri-*

In *Broadcast Music*, this Court provided an analytical framework for evaluating concerted activity. The Court posed two central questions in attempting to characterize the blanket copyright licenses challenged there: first, is the practice "'plainly anticompetitive'" (441 U.S. at 8 (citation omitted)) in that it "facially appears to be one that would always or almost always tend to restrict competition and decrease output?" (*id.* at 19-20). And, second, is the practice "designed to 'increase economic efficiency and render markets more rather than less competitive'?" (*id.* at 20 (citation omitted)).

With those two questions, *Broadcast Music* sharply focused the characterization process: courts should first ask whether challenged conduct is likely, absent an efficiency justification,[9] to lead to the restriction of output, for such conduct is inherently suspect. Where output restriction does appear likely, we must ask whether there is a plausible efficiency justification for the practice, *i.e.*, is there reason to believe that the restraint may nonetheless have significant efficiency benefits and therefore enhance competition and output. In the event that there is no plausible efficiency justification, the suspect practice is per se illegal because there are no possible procompetitive effects to offset its inherent tendency to reduce output and thereby injure competition and consumer welfare. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980).

But, in cases where the participants raise a plausible efficiency justification for conduct that is facially sus-

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can Medical Ass'n, 94 F.T.C. 701, 1004 (1979), aff'd, 638 F.2d 443 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982). "Where horizontal arrangements * * * closely relate to prices * * *, a less elaborate analysis of competitive effects is required." *Michigan State Medical Society*, [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 21,991, at 22,461 (Feb. 17, 1983).

[9] An efficiency justification exists if the challenged restraint increases the quantity or quality, or reduces the cost, of overall output—*e.g.* by creating a new product, improving the operation of a market, or reducing production or marketing costs—*and* is reasonably necessary to achieve such efficiencies.

pect, per se characterization is inappropriate, because more scrutiny is needed to evaluate the restraint's overall competitive effect. It may be that further examination will show that the proffered efficiency justification should be rejected; in that event, the conduct can still be condemned as unreasonable without completing a "full" rule of reason analysis that includes market definition and market power determinations. On the other hand, if efficiency benefits are shown to be likely, a more elaborate rule of reason inquiry is called for, with a thorough analysis of market power, in order to determine whether the practice is, on balance, harmful or beneficial.

It will, of course, be easier in some instances than in others to determine whether there is merit to a proffered efficiency justification for suspect conduct. Some agreements will clearly be "naked restraints" with no purpose except stifling competition, and will have no efficiency justification, or the justification offered may be clearly untrue, frivolous or de minimis. Similarly, an "efficiency" argument can be summarily rejected if it is not based on an enhancement of competition, but instead argues that the particular characteristics of an industry require a lessening of competition in order to promote trade or some other public value. Even if such a claim is couched in terms of "efficiency," it is not a cognizable antitrust defense. *Professional Engineers*, 435 U.S. at 689.

The assessment of an efficiency explanation will often be more difficult when, as in this case, the collaborators are engaged in a form of productive economic integration. Nevertheless, it is not enough that a restraint *accompanies* an otherwise legitimate cooperative activity (such as the creation of a new product, or operation of a market exchange). A restraint that appears inherently likely to restrict output or enhance price can be justified as an efficiency only if it is also "capable of increasing the effectiveness of that co-operation and no broader than *necessary* for that purpose." R. Bork, *supra*, at 279 (emphasis added).[10]

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[10] Accordingly, the analysis in *Broadcast Music* did not end when this Court noted that the blanket license and fixed prices "accom-

Thus, even if the challenged conduct is that of a cooperative joint venture that legitimately integrates certain production or marketing functions, this does not mean that the conduct can never be condemned as unlawful without extensive inquiry into its actual competitive effects. The nature of the joint venture's conduct—and not merely its designation as a joint venture—is determinative.[11] See, generally, Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523 (1982). If a limited examination reveals that its principal purpose or effect is to stabilize prices or restrict output of products previously sold by the venturers independently, or that the procompetitive integrative functions of the joint venture are not dependent on the challenged restrictions, its restrictive conduct should be struck down as unlawful under a truncated rule of reason analysis without further scrutiny.[12]

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pan[y] the integration of sales, monitoring, and enforcement against unauthorized copyright use" (441 U.S. at 20). Instead, the Court went on to emphasize that a "middleman with a blanket license was an obvious necessity" in the industry (*ibid.*), and that "a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established" (*id.* at 21).

[11] It is well-established that anticompetitive rules or practices of a voluntary membership association are subject to the antitrust laws where a "valuable service germane to petitioners' business and important to their effective competition with others [is] withheld from them by collective action." *Silver* v. *New York Exchange*, 373 U.S. 341, 348-349 n.5 (1963). See *Associated Press* v. *United States*, 326 U.S. 1 (1945); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1373-1374 (5th Cir. 1980); Bodner, *Antitrust Restrictions on Trade Association Membership and Participation*, 54 A.B.A. J. 27, 28 (1968); Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*, 70 Colum. L. Rev. 1325, 1345-1346 (1970). Although membership in the NCAA is "voluntary" in that a member can withdraw at any time, membership is essential for any school that wishes to engage in intercollegiate athletics, *i.e.*, to have a well-rounded sports program, to recruit quality athletes, and to compete in national championships. Pet. App. 53a-54a, 101a-102a; Tr. 125, 294-297, 335-336.

[12] See *Maricopa*, 457 U.S. at 352. Although *Maricopa* does not explicitly adopt the analytical framework outlined above, the de-

This does not mean, of course, that plaintiffs and courts can merely second-guess those participating in an otherwise legitimate enterprise, and invalidate any restraint that is not the "least restrictive" imaginable or practicable. Like many antitrust questions, whether a restraint is "reasonably related" or "reasonably necessary" to procompetitive collaboration requires a court to exercise its judgment, but, as was true here, courts have proven to be quite capable of making those judgments. See *Areeda Monograph* 8-10; pages 20-30, *infra*.[13]

Where the practice at issue is shown to pose high anticompetitive risks because, on its face, it restricts output or restrains price competition, a court can and should address the above efficiency questions without conducting

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cision is fully consistent with this framework and with the similar approach employed in *Broadcast Music*. The Court in *Maricopa* sought to analyze whether the challenged agreement might enhance competition significantly (457 U.S. at 351-354). In concluding it would not, the Court stressed that the insurance carriers, not the physicians, underwrote the health care plans and that it was not necessary for physicians to establish the fee schedules in order for the plans to function effectively (*id.* at 352); moreover, the Court clearly indicated that competitors who act jointly could avoid the per se price-fixing rule when they form "partnerships or other joint arrangements in which [they] * * * pool their capital and share the risks of loss" (*id.* at 356). Thus, given the facts of record, the outcome in *Maricopa* can be understood as reflecting a judgment that the joint setting of prices, a facially suspect practice, was not shown to be ancillary to any operational integration or other efficiency-enhancing arrangement that could justify avoidance of the per se rule. The joint fee schedule was not reasonably related to the doctors' peer review activities. Nor was it reasonably related to the "approved" health care coverage offered and underwritten by independent insurance carriers (rather than by the physicians, who were not joint venturers with the insurers and bore no financial risk). It was also clear that the insurers could have offered such plans without using fee schedules established by a physician group. Therefore, the respondents had not shown any efficiency justification for a facially suspect practice, and the Court declared it unreasonable per se.

[13] See, *e.g.*, *American Medical Ass'n* (medical society's ban on all advertising by physicians found to be overbroad, since goal of protecting patients from deception could be achieved directly by banning false and deceptive advertising).

a "full" rule of reason analysis of market definition and market power. *Broadcast Music*, 441 U.S. at 19 n.33. If at any point it becomes clear that the collaborators have no viable, significant efficiency justification, a facially suspect restraint can be condemned without further inquiry.

B. The Court of Appeals Should Not Have Condemned the NCAA's Conduct as Per Se Unlawful

Applying this analysis to the present case, the NCAA's televison controls should not be invalidated under the per se rule. Even though the conduct facially appears to restrict output, NCAA has offered plausible efficiency justifications that must be weighed. The court of appeals found that petitioner's conduct constituted price fixing and was illegal per se because it restricted output and manipulated price (Pet. App. 6a-7a).[14] It rejected NCAA defenses to the per se rule, finding that the restraints did not promote efficiencies in legitimate rulemaking functions, and were unnecessary to achieve the joint marketing of a more competitive product (Pet. App. 13a).[15]

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[14] The court noted two aspects of "price-fixing": First, a single price is set for the entire football television package. Second, every national and regional game in the package commands the identical price: more prominent, better quality teams and more widely viewed games cannot garner higher prices; less popular teams cannot offer lower prices to make their games attractive to broadcasters. The court of appeals found that, while this latter distribution of revenues "distort[s] * * * free market forces" it does not in the aggregate constitute price enhancement, *i.e.*, "price-fixing" (Pet. App. 7a n.5).

[15] The court rejected the contention (Pet. App. 10a) that the plan increases output by promoting live attendance at the stadium. It specifically noted the district court's rejection of the claim that the plan enhances live viewership (Pet. App. 10a n.8), and did not quarrel with that finding. It noted that total viewership—including television and live audiences—was not necessarily increased, and that the reduced availability of desirable options for football viewers suggested inefficencies rather than competitive benefits. The court also rejected the argument that the restraint promotes competitive balance. As a noneconomic justification, the court deemed it irrelevant. In any event, it concluded that balance could be achieved by less restrictive means (Pet. App. 11a; see *id.* at 10a n.7).

In our view, however, this case does not warrant per se treatment. It does not involve conduct of a type with which the courts have substantial experience, such as straightforward price fixing by competitors (see *Broadcast Music*, 441 U.S. at 9-10, 19 & n.33). Nor does it involve a naked restraint imposed by competitors who have no legitimate cooperative relationship with one another. See Blecher & Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act*, 4 Whittier L. Rev. 217, 237 (1982). The NCAA has shown (and respondents do not deny) that a certain amount of cooperation between the colleges is necessary and that some form of regulation is desirable, and probably necessary, for the organization and preservation of amateur intercollegiate athletics (Pet. App. 6a, 9a).

In essence, the NCAA argues that its challenged conduct enables the joint venture to offer a new product—ordinarily a procompetitive activity (Pet. 15-17). It describes itself as a rulemaking and promotional association, like a trade association engaging in permissible regulatory behavior (Pet. 2). It also describes itself as a joint selling agency for its member institutions who have agreed to transfer to it the sole authority to negotiate the sale of their output, *i.e.*, the right to broadcast the games in which they compete (Pet. 3, 8). Generally, such joint selling agencies are not subject to per se condemnation; rather, at least a limited scrutiny of the effect of the restrictions is appropriate. See, *e.g.*, *Broadcast Music*, *supra*. Indeed, while the court of appeals held the current "exclusive control" of television rights unlawful, it reserved decision on whether television "rights may be [otherwise] commonly regulated" (Pet. App. 27a). Such reservations "tend to impeach the *per se* basis for the holding of liability." *Broadcast Music*, 441 U.S. at 17 & n.27.[16] Where an agreement's "competitive effect can only

[16] Because the success of a sports league requires some sort of economic joint venture—no team can engage in a competitive sport by itself—the courts and commentators generally deem it advisable to eschew per se condemnation and evaluate regulations

be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" it is properly evaluated under a rule of reason rather than treated as unreasonable per se. *Professional Engineers*, 435 U.S. at 692; see *White Motor Co. v. United States*, 372 U.S. 253 (1963).

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE NCAA TELEVISION PLAN IS UNLAWFUL UNDER THE RULE OF REASON

Although petitioner's conduct is not unreasonable per se, it is facially suspect for the reasons stated by the lower courts. Both courts below made alternative findings that the challenged conduct was unduly restrictive under a rule of reason analysis. We believe that their factual findings support, under the analytical framework discussed above, the conclusion that the challenged conduct unreasonably restrained competition. Accordingly, the judgment below should be affirmed.

After a full trial, the district court concluded, and the court of appeals agreed, that the NCAA's controls appear on their face to be the type of restraints that would tend to reduce output and limit the choices available to buyers. It is clear, and both courts below found, that absent these controls the amount of such broadcasting would be much greater, the televised games would better coincide with consumer preferences, and payments received would vary considerably to reflect anticipated viewer interest in each particular football match-up.

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of such leagues under the rule of reason. See, *e.g.*, *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1180-1181 (D.C. Cir. 1978); *Mackey* v. *NFL*, 543 F.2d 606, 618-620 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); *Los Angeles Memorial Coliseum Commission* v. *NFL*, 484 F. Supp. 1274, 1276 (C.D. Cal. 1980), rev'd on other grounds, 634 F.2d 1197 (9th Cir. 1980); *Kapp* v. *NFL*, 390 F. Supp. 73, 80-81 (N.D. Cal. 1974), aff'd, 586 F.2d 644 (9th Cir. 1978), cert. denied, 441 U.S. 907 (1979); Blecher & Daniels, *supra*, at 238; Closius, *Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry*, 24 B.C.L. Rev. 341, 345 (1983); Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws:* Los Angeles Memorial Coliseum v. National Football League, 15 Conn. L. Rev. 183, 192 (1983).

Once the plaintiffs established the high anticompetitive potential of the challenged conduct, the burden of coming forward with countervailing evidence of an efficiency justification was placed on the defendant. The district court made a series of factual findings, which were not clearly erroneous, that the restraints were unlikely to enhance the efficiency of NCAA's legitimate rulemaking and promotional activities because: (1) petitioner's defense amounted to a claim that competition had to be restricted in this way for the market to operate properly, an argument not cognizable under the antitrust laws (see *Professional Engineers*, 435 U.S. at 689); and (2) there was little or no evidence to support a conclusion that efficiency would be enhanced by the controls, while there was persuasive evidence to the contrary.[17]

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[17] This conclusion is clearly correct. For example, in arguing that its broadcast rules contribute to legitimate NCAA promotional efforts, petitioner asserts that the rules are necessary to overcome free-riding problems and thereby motivate networks to promote NCAA football broadcasts. There appears to be no merit to this free-rider argument. First, there is no reason to believe that a network would not adequately promote its own NCAA football broadcasts either because other games might also be televised on other networks or because it is not guaranteed an entire series of games. Networks vigorously promote particular situation comedies, soap operas, adventure series, movies, college basketball games, and major sports events, even though other networks have similar programming. There appears to be no lack of promotion and resultant decrease in output because networks fear free-riding by their competitors. Indeed, since the NCAA now contracts with more than one network, as well as with a cable firm, for the broadcasting of college football games, it apparently no longer believes that exclusivity is needed to achieve adequate promotion.

Second, many viewers are not interested in seeing just *any* NCAA football game—they want to know which game is being presented. When a network announces that it will show a particular, desirable game, other networks cannot free-ride in any significant way, because they will not be showing the same game. Free-riding succeeds only for products with identical characteristics. See R. Posner, *supra*, at 149-150. Similarly, there has been no showing and there is no reason to believe that the NCAA "brand" is what attracts viewers to a particular game. The common sense of the matter is that viewers are more attracted by the reputation of the particular teams, by local interest, or by conference rivalries, than

On these findings, the lower courts could have determined, without an elaborate inquiry into market power or actual anticompetitive effects, that the NCAA's exclusionary policies violated the Sherman Act under the rule of reason. We develop the application of this analysis to this case more fully below.

A. The District Court Correctly Held That Plaintiffs Satisfied Their Burden of Showing the Significantly Anticompetitive Potential of the NCAA's Conduct

In the present case, the NCAA's member colleges have agreed not to compete in the sale of television rights. Independent decisionmaking by the colleges has been replaced by a joint venture, which acts as exclusive selling agent. The record contains evidence supporting the district court's finding that "many more games would be televised in a free market than are televised under NCAA controls" (Pet. App. 91a; Tr. 252-253, 537-539, 859-860, 1003-1007, 1305), and the court of appeals specifically endorsed this finding (Pet. App. 14a). Indeed, the district court found that the very purpose of the NCAA's policy was to limit individual members' sales (Pet. App. 66a-67a). The NCAA's football television policy also artificially suppressed product diversity by restricting the opportunity for regional or local broadcasts of individual college games of local interest, and deprived consumers (viewers) of their choice of games by limiting the number of television appearances by individual

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by the NCAA label—especially since virtually all televised college football games involve NCAA schools.

Finally, while it may indeed be true that a network is more motivated to promote the NCAA when it has rights to a series of games over the entire season (as opposed to sporadic rights to individual games), no one is challenging here the right to offer a series contract. As with other arguments made by petitioner, a justification that warrants the offering of a season-long contract does not explain or justify the need for exclusivity. Even if free-riding somehow made it desirable to offer networks an entire series of games, the NCAA has suggested no basis for concluding that free-riding justifies exclusive contracting rights and the prohibition of individual negotiations by member schools or conferences.

teams. The evidence showed that these restrictions reduced the opportunity for many smaller schools to appear on television (either locally or regionally) (Tr. 252-253, 537-539), and reduced the opportunities for the major football schools to appear (either on national or regional broadcasts) as frequently as consumer demand would dictate (Tr. 370-371, 856-857).[18]

In an attempt to minimize the significance of the competitive distortions resulting from its television policy, the NCAA contends that it lacks market power in the market for television programming because advertisers can use other programming to reach their desired audiences (Pet. Br. 30-46).

As indicated, pages 7-10, *supra*, where the challenged conduct would, on its face, appear directly to restrict output or fix prices, courts may, without undertaking precise market power analysis of the type required in monopolization and merger cases, require the defendant to justify the challenged conduct in terms of its procompetitive potential. See *Professional Engineers*, 435 U.S. at 692; *American Medical Ass'n* v. *FTC*, 638 F.2d 443, 449-450 (2d Cir. 1980), aff'd by an equally divided Court, 455 U.S. 676 (1982). Here, however, the lower courts did not rely solely on the inherent anticompetitive potential of the challenged conduct. Instead, they concluded, on the basis of findings that are not clearly erroneous, that the NCAA had substantial power in the collegiate football television market. The NCAA seeks to refute that market power finding by claiming that "[t]here is simply no way in which the NCAA, by cutting back the output of games, can induce advertisers to part with an extra nickel." Pet. Br. 38; see also Pet. Br. 40. But the networks and, derivatively, the advertisers

[18] This type of collective suppression of product diversity can be as anticompetitive as collusive reductions in output. Such behavior interferes with consumer choice and can give rise to the same types of inefficiencies that are the ultimate concern of all antitrust prohibitions, *i.e.*, reduced output of desired products and increased consumption of less desired substitute products. See, *e.g.*, R. Dorfman, *Prices and Markets* 155-156 (3d ed. 1978); R. Bork, *supra*, at 98-101.

(see Pet. Br. 38) in fact do pay more for the exclusive NCAA contracts than they would pay if schools could sell rights outside the package as well. The exclusionary feature of the package allows the chosen few networks to deliver larger audiences to advertisers than would be the case if there were competing local or regional telecasts arranged by those schools that would sell their television rights to broadcasters but for the NCAA restraints (Pet. App. 67a; Tr. 1248).

Moreover, if college football telecasts actually were only an undifferentiated part of a large entertainment television market, there would be no need for the networks to seek an exclusive right to telecast the games. Such games would be subject to intense competition from other equally attractive forms of television entertainment. The fact that the networks seek, and obviously pay, to limit the amount of competition from other college football telecasts even though they face other forms of television competition, reflects their recognition that college football is indeed a distinct product in the eyes of a significant number of viewers. See also Tr. 256-257, 357-361. For this group of consumers, the NCAA's restraints on the variety and output of college football telecasts have significant anticompetitive effects. As NCAA's own expert testified, advertisers often want to reach different audiences with their advertising packages, and college football reaches an audience on Saturday afternoons that is not necessarily available at other times through other programming (Tr. 1234-1236, 1238, 1251, 1292). NCAA concedes that advertisers are willing to pay more for this audience (Pet. Br. 33).

There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Conse-

quently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the "reasonableness" of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of "reasonableness" (2 P. Areeda & D. Turner, *Antitrust Law* ¶ 500, at 321 (1978)). And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.[19]

B. The Court of Appeals Properly Rejected Petitioner's Defenses

The NCAA has argued that in the creation of the college football television rights, it functions as a joint venture, similar to the performing rights societies in *Broadcast Music* (Pet. 15). But the fact that the NCAA performs some legitimate joint venture activities serves only to begin the rule of reason inquiry, not to end it. In view of the suspect nature of its television restrictions, the NCAA had the burden of demonstrating a sufficiently strong relationship between the restraints and its productive activities.

The NCAA did in fact proffer several justifications, and the district court heard the evidence presented as to their validity. It then concluded not only that the NCAA had failed to carry its burden of proof, but also that plaintiffs' evidence was more convincing. The court of appeals was therefore correct in holding that there was sufficient record evidence to sustain the conclusion reached

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[19] See R. Posner & F. Easterbrook, *Antitrust* 347 (2d ed. 1981) (noting in their chapter dealing with market definition and market power as an "Introduction to the 'Power Offenses' " that an analysis of market power is generally not required for practices, such as per se offenses under Section 1, which evidence no redeeming virtue).

by the district court, and there is no reason for this Court to overturn the factual findings on which the two lower courts agree. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[20]

1. The NCAA claims that its television controls are necessary to maintain a competitive balance among the teams that play against one another on television (see, *e.g.*, Pet. Br. 20-22). It argues that the television package puts competing teams on a more equal footing and results in more evenly matched, hence more exciting, games; this, it is said, better enables college football to compete with other forms of television programming. There is little, if any, evidentiary support for this position, however.

We do not gainsay that the success of college football requires sufficient parity among competing teams to create some unpredictability as to the outcome of individual games. In fact, the NCAA has a number of rules that seek directly to promote competitive parity in college football. These rules limit the sizes of squads, the number of scholarships that may be offered, the number of practices that may be held, the sizes of coaching staffs, the numbers of years of eligibility, and minimum scholastic performance levels for obtaining and maintaining eligibility (Pet. App. 9a)—all without direct restrictions on output.

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[20] In particular, we believe that the NCAA has failed to explain the necessity of its assuming the role of exclusive selling agent for the colleges, *i.e.*, how the product would be damaged if colleges were granted the right to contract independently with local stations for the broadcasting of individual games (see Pet. App. 70a). Indeed, the courts below noted this as a major distinction between the present case and *Broadcast Music*, in which, although the performing rights societies organized umbrella sales agreements, individual authors retained the power to sell the performing rights to their compositions on an individual basis (Pet. App. 14a, 93a). Even if it were found to be procompetitive for there to be a weekly NCAA "game of the week" on network television, that would not require that all schools whose games are not selected to be shown in any given week be prevented from selling their television rights to local, regional or national broadcasters.

The telecasting restrictions are, at best, an indirect means of promoting the parity that are the direct objective of other NCAA rules, and there is little support for the NCAA's contention that the television restrictions play a significant role in promoting competitive parity.[21] First, the restraints have not prevented the emergence of a "power elite" among the major football schools (Pet. App. 98a; cf. Pet. Br. 22 n.11), and yet that elite has not dominated the sport to the detriment of competition. Second, the NCAA has not imposed exclusivity restrictions on the telecasting of college basketball games, although competitive parity is presumably as important in basketball as it is in football (Pet. App. 47a-48a). The absence of such telecasting restrictions has not led to competitive imbalance in college basketball (Pet. App. 76a; Tr. 240-242). With this background, it is not surprising that witnesses testified, and the courts found, that a loosening of the NCAA's restrictions would result in the proliferation of televised football on the local and regional levels (Pet. App. 14a, 21a; Tr. 252-253, 537), with a concomitant increase of television income to those whose games are rarely broadcast under the current system.[22]

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[21] There is no evidence that competitive parity throughout the entire NCAA Division I membership is necessary to provide football that consumers want. The NCAA itself recognizes the different caliber of football played by its members by dividing them into different classes, *e.g.*, I-A, I-AA, II and III. It is well known that there exist significant disparities among the qualitative levels of football played in different conferences, *e.g.*, compare the "Big Eight" to the "Ivy League." Nonetheless, there are many fans of "Ivy League" football. At best, there appears to be a need for some semblance of competitive parity within a conference, but the NCAA made no attempt to justify its national restrictions on television marketing on the basis of such intra-conference parity needs—needs that extend to non-televised as well as televised games.

[22] The apparent anomaly of the NCAA member schools' supporting a restrictive football telecasting policy that lessens the total income received for football telecast rights may be attributable to the fact that the current policy benefits financially those member schools that do not play football (approximately 300 schools, see Tr. 769), or football schools in Divisions II and III that are unaffected by the current restrictions (300 additional schools, Tr.

The NCAA, of course, offered conflicting testimony. But as the district court noted, although various witnesses for the NCAA argued that the restrictions were necessary, none was able to articulate any credible reason why that was so (Pet. App. 70a).

2. The courts below also correctly rejected the NCAA's claim that uncontrolled telecasting would result in the reduction of live attendance at football games (cf. Pet. Br. 25-27). This argument stems from the notion that abridgement of competition in the telecasting of college football is necessary to maintain live attendance at games, which in turn is necessary to the success of college football. There is little evidentiary support for this two-tiered speculative claim. First, the predictions of harm caused by telecasting were not borne out by the evidence (Pet. App. 68a-70a, 10a n.8); moreover, the NCAA's own witnesses testified that, at best, television's impact on live attendance was "slight" or "small" (Tr. 954, 1049). Other witnesses testified to studies that showed no negative impact by television on live attendance (Tr. 320-321, 326-327; see also Tr. 817).[23] Indeed, the NCAA has steadily increased the number of games in its football package every time it has negotiated a new network package.

The most compelling reason to reject the NCAA's position is that it fails to present a valid efficiency argument. Even if we adopt petitioner's assumptions, there is no reason to believe the rules enhance efficiency; they merely prevent competition. Thus, the NCAA argues that the restrictions "increase live attendance at games by reducing the conflict between telecasting and live games" (Pet. Br. 25) and that the rules are needed to protect or raise revenues from live attendance (*ibid.*). All output restrictions are meant to enhance revenues or prices; anti-

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770). Although not directly affected by the rules, these members can control the voting.

[23] Although the court of appeals found "some evidence that supports the conclusion the plan enhances live viewership," it noted the district court's rejection of the argument and did not find it to be clearly erroneous (Pet. App. 10a & n.8).

trust law, however, allows collaborators in a productive joint venture to limit competition in order to protect each other's revenues only when a significant efficiency results. The NCAA has not demonstrated any such efficiency and none is apparent.

It appears, therefore, that the sole purpose of the rules imposed to protect the live gate is to prevent the price of tickets from falling due to competition from televised games. Without televised college football, schools are virtual monopolists or oligopolists in their localities in selling live college football. Televised games, however, turn schools that never competed for live audiences into potential or actual competitors for viewers. The NCAA wishes to prevent that "conflict" or competition from developing—because competition drives down the price of tickets at stadiums; to get the same number of people to the stadium, a school may have to lower its ticket prices when college football is also being shown on television. Preventing competition in order to preserve a monopoly position is hardly an efficiency goal.

The NCAA also argues, however, that it creates two products—attendance at stadiums and broadcast rights to college football games—and that efficiency or output is enhanced by preserving live gate attendance. An analogy may be useful to show that the underlying purpose is to restrict competition rather than enhance efficiency. Motion picture producers also produce a product that can be seen in two locations—in a theater and at home on a television set. If all major movie companies agreed, however, to limit the number of films they permit on television in order to preserve theater revenues (or if they agreed to allow none to be aired on weekend nights), we would scarcely say that they were increasing output or efficiency. Like the NCAA, the movie makers would be limiting output and competition in order to protect prices and revenues. The live gate argument, therefore, was properly rejected.[24]

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[24] To the extent that the NCAA contends that its television restrictions are necessary to achieve laudable goals unrelated to promoting competition, *i.e.*, a sharing of the wealth provided by

3. The NCAA also suggests that its restrictions on the telecasting of football games makes possible various production cost savings and the creation of a "series" (Pet. Br. 22-24). Petitioner argues that fewer production crews are needed for the games telecast by the networks under the present exclusive contract than would be needed absent the exclusivity provisions (*id.* at 24). A plausible showing of such joint venture savings, if significant in terms of total expenses, might, as petitioner suggests, take the case out of the per se category. But, if further examination reveals the justification to be insubstantial, it must be rejected and the restraint deemed unreasonable.

We have found no evidence in the record to support the claimed existence or significance of such production cost savings, and the NCAA points to none. The claim is economically illogical, moreover. If broadcasters, free of the NCAA restraints, contract with schools to televise additional football games, and incur the expenses of doing so, it is because they believe that the gain to viewers, as reflected in the willingness of advertisers to support the additional program, more than outweighs its production costs. Under the NCAA's approach, in contrast, it alone decides what number of football games are "enough" for the viewing public, and, like a classic monopolist, reduces output to that level. Insofar as any "savings" could be realized by NCAA's reducing the joint output of its members, however, a court can only conclude that such savings are attributable directly to the restriction of output (and the market power that makes it possible) and can hardly justify the competitive restraint that produces them.[25]

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television, the defense is not cognizable under the antitrust laws (see Pet. App. 10a n.7). Indeed, it is precisely the type of defense rejected by this Court in *Professional Engineers*, 435 U.S. at 689-692.

[25] Every price-fixing agreement could be said to enhance efficiency, by reducing the transaction costs of sellers in determining their prices and the search costs of consumers in deciding which product to purchase. This type of "efficiency" claim is attributable solely to the elimination of competition, however, and the Court has rejected it. See *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. at 649;

The argument (Pet. Br. 23) that no single broadcaster would "promote" NCAA football if the benefits of that promotion would inure to other broadcasters also invites skepticism, since there are now three networks that carry NCAA football, and presumably each of them is promoting it. See note 17, *supra*. Similarly, there is no reason to believe, as the NCAA contends (Pet. Br. 23), that in a competitive market games would have to be sold in advance of the football season, preventing networks from having flexibility in choosing the most interesting games for their "game of week" series. Schools are eager for the exposure of national television. There is every reason to believe, therefore, that schools, in entering into local or regional television sale contracts, would reserve the right to appear on a national network, if chosen. In sum, the NCAA's argument about cost efficiencies is merely an unpersuasive attempt to relitigate the facts.[26]

4. The NCAA contends that the fact that the television networks engage in competitive bidding for the NCAA package saves it from condemnation (Pet. Br. 46-49). But the product offered for that competitive bidding is an exclusive contract that the lower courts found reduces output and consumer choice. In any event, petitioner's argument rests on asserted benefits flowing from the NCAA package—*e.g.*, "promot[ing] competitive balance," "increas[ing] viewership on TV," and enabling "TV stations to deliver football at a lower cost per viewer" (Pet. Br. 48)—that find no support in the record, or that

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Maricopa, 457 U.S. at 353-354; accord, R. Bork, *supra*, at 268; *Areeda Monograph* 43-44.

[26] Petitioner's attempt to analogize the NCAA football package to television programs such as "Dynasty" (Pet. Br. 23) also fails. Unlike the producers of a series like "Dynasty," the NCAA does not produce or create the football games at issue. The individual schools produce the teams and schedule their games, often many years in advance. They did so prior to the advent of television and they continue to do so now. Moreover, such an entertainment series, unlike college football, does not constitute a distinct programming market, and the packaging of such a series does not prevent the broadcast of similar, competing programs.

are contradicted by the lower courts' findings. The courts below found that the NCAA package does not directly contribute to competitive parity, nor does it increase TV viewership.[27] To the contrary, the two courts below found that the "exclusivity" of the football television package in this market is contrived in the sense that it is not attributable to demonstrable efficiencies; and that, absent the NCAA controls, more televised games would be offered and sold. Petitioner simply has not offered a satisfactory justification for that market distortion.

5. The NCAA complains that the court of appeals improperly placed the burden on it to "prove not only the existence and extent of procompetitive benefits but also the 'necessity' of the contractual arrangements" (Pet. Br. i). While this argument is framed as a defense to the per se holding only (*ibid.*), petitioner seeks to overturn

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[27] In this context, petitioner's claim that it creates competition by offering a series contract through an exclusive sales agent should be rejected. Petitioner incorrectly equates the competition created when a single *buyer* asks all potential sellers to bid on an exclusive contract with its own situation in which all competitors create a single *seller* and ask buyers to bid for the exclusive contract. The NCAA joint sales situation is far more likely to create market power and output restriction than is one in which each seller is competing for the exclusive right to provide a product to an individual buyer over the term of a contract.

Petitioner's attempt to equate its football plan with the anesthesiology contract in *Hyde* v. *Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), cert. granted, No. 82-1031 (Mar. 7, 1983), should be rejected. In *Hyde*, a single hospital located in a metropolitan area with numerous other hospitals entered into an exclusive supply contract with one group of anesthesiologists. This caused rival groups of anesthesiologists to compete to obtain the exclusive contract if they wanted to utilize the hospital's facilities. The instant case is not at all analogous. The *Hyde* facts would be similar to the NCAA's football plan only if they were turned on their head—if all anesthesiologists in the geographic market joined together in a group and told all the hospitals that anesthesiology services would be provided only as a package and under particular contract terms that specified a minimum amount of services, that limited the use of particular anesthesiologists who were held in high esteem, and that forced all hospitals to deal through the group rather than directly with any individual member.

the lower courts' rule of reason analysis on this basis as well (Pet. Br. 32-33). Petitioner's position on both of these issues, however, is contrary to established law.

Once the plaintiffs demonstrated the high anticompetitive risk inherent in the defendant's conduct (Pet. App. 6a-7a, 64a-66a), it was entirely proper to place the burden on the NCAA to establish its defense of countervailing benefits.[28] Although petitioner failed even to demonstrate that the football television restrictions were reasonably related to procompetitive aspects of its joint venture (see pages 20-26, *supra*), it claims that the lower courts erred in requiring it to prove that its restraints were absolutely necessary, in the sense that they were the least restrictive alternative for attaining competitive parity (Pet. Br. 29). This argument takes the word "necessary"

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[28] In an antitrust suit, as in other civil suits, the burden of proof is on the party seeking relief. *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942); *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981). Once the plaintiff proves the existence of an unreasonable restraint, however, as respondents did here, the burden of proof shifts to the defendant to prove the existence of a defense to that statutory violation. "[T]he burden of proving justification * * * to the prohibitions of a statute generally rests on one who claims its benefits." *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (footnote omitted) (cost justification defense under the Robinson-Patman Act); accord, *United States* v. *First City National Bank*, 386 U.S. 361, 366 (1967) (defense under 12 U.S.C. 1828(c)(5)(B) to anticompetitive merger); see *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 138-139 (1969) ("failing company" defense under Section 7 of the Clayton Act, 15 U.S.C. 18); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1139 n.5, 1146 (8th Cir. 1981); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 739 (9th Cir. 1981), cert. denied, No. 81-2359 (Jan. 17, 1983); *Switzer Bros. v. Locklin*, 297 F.2d 39, 46 (7th Cir. 1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (E.D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961); see also *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 8 (1958). This requirement that the defendant come forward with a satisfactory justification for an agreement after the plaintiff has proven its inherently anticompetitive nature or effect does not amount to an improper shifting of the burden of proof. *FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 244-246, 251, 253 (1968); *Areeda Monograph* 34.

out of the legal context in which it was used by the lower courts, *i.e.*, to mean "reasonably related to," and ascribes to it a meaning—"absolutely necessary," *i.e.*, there being no less restrictive alternative—not fairly attributable to those courts.

The requirement that a defendant show that an anticompetitive restraint is "necessary" to foster (*i.e.*, "reasonably related to") a legitimate business or statutory purpose is entirely consistent with an unbroken line of precedent. The rule was set out more than 85 years ago in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) ("no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and *necessary* to protect the covenantee in the enjoyment of the legitimate fruits of the contract * * *. [I]f the restraint exceeds the necessity presented by the main purpose of the contract it is void").

This Court and the lower courts apply the rule routinely in examining the reasonableness of anticompetitive restraints.[29] While the clear availability of less restrictive alternatives is not dispositive, it is a relevant factor in determining whether a restraint is reasonably necessary.[30]

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[29] *Silver*, 373 U.S. at 361; *NFL* v. *North American Soccer League*, No. 81-2296 (Dec. 6, 1982), slip op. 6 (Rehnquist, J., dissenting from denial of cert.) (anticompetitive practices "must be narrowly drawn to vindicate the legitimate interest"); *Roberts* v. *Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1482 (9th Cir. 1983); *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1372, 1376 (5th Cir. 1980); cf. Pet. Br. 17 & n.7.

[30] *White Motor Co.* v. *United States*, 372 U.S. 253, 270-272 & n.13 (1963) (Brennan, J., concurring); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975); *Betaseed, Inc.* v. *U and I, Inc.*, 681 F.2d 1203, 1215, 1230 (9th Cir. 1982); *North American Soccer League* v. *NFL*, 670 F.2d 1249, 1259 (2d Cir. 1982), cert. denied, No. 81-2296 (Dec. 6, 1982) (Rehnquist, J., dissenting); *Rosebrough Monument Co.* v. *Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1145 (8th Cir. 1981).

The "reasonably necessary" standard is precisely the standard the district court applied here (Pet. App. 95a). There is no indication that either the district court or the court of appeals adopted any more rigid standard (cf. Pet. Br. 31-32 n.17). Neither court spoke of a "least" restrictive alternative. Indeed, neither court rejected petitioner's justifications solely because they were not necessary to effect the legitimate objectives of the NCAA. The justifications were rejected because they were found to be ineffective as well as unnecessary in advancing the objectives sought (see pages 20-26, *supra*). Thus, the "reasonably" necessary standard was not met. See *Bravman* v. *Bassett Furniture Industries, Inc.*, 552 F.2d 90, 102 (3d Cir. 1977).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 83-271-CFX
Status: GRANTED

Title: National Collegiate Athletic Association, Petitioner
v.
Board of Regents of the University of Oklahoma and
University of Georgia Athletic Association

Docketed:
August 13, 1983

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Easterbrook, Frank H.

Counsel for respondent: Coats, Andy

Entry	Date	Note	Proceedings and Orders
1	Aug 13 1983	G	Petition for writ of certiorari filed.
2	Jul 15 1983		Application for stay filed.
3	Jul 16 1983		Temporary stay granted by White, J.
4	Jul 19 1983		Response received.
5	Jul 19 1983		Memorandum of United States as amicus curiae received.
6	Jul 20 1983		Motion for leave to file memorandum of Black Colleges as amicus curiae received.
7	Jul 21 1983		Stay granted by White, J. with memorandum opinion.
8	Jul 21 1983		Reply received.
9	Jul 21 1983		Granted with memorandum opinion.
10	Sep 26 1983		Brief amicus curiae of Assn. of Indep. TV Stations filed.
11	Sep 27 1983		Brief of respondents Bd. of Regents, Univ. of OK, et al. in opposition filed.
12	Sep 28 1983		DISTRIBUTED. October 14, 1983
13	Oct 17 1983		Petition GRANTED.
		*	**********
14	Nov 30 1983		Brief amicus curiae of National Federation of State High School Associations filed.
15	Dec 1 1983		Brief of petitioner NCAA filed.
17	Dec 1 1983		Joint appendix filed.
		*	(Two Volumes)
19	Dec 28 1983		Order extending time to file brief of responcent on the merits until January 16, 1984.
20	Dec 30 1983		Record filed.
21	Dec 30 1983		Certified original record & C.A. proceedings (Box) received. 3 other boxes received Jan. 3, 1984.
22	Jan 13 1984		Brief amicus curiae of Assn. of Indep. TV Stations filed.
23	Jan 17 1984		Brief amicus curiae of United States filed.
24	Jan 16 1984		Brief of respondent Bd. of Regents, Univ. of OK filed.
25	Dec 19 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Feb 14 1984		SET FOR ARGUMENT. Tuesday, March 20, 1984. (1st case)
27	Feb 15 1984		CIRCULATED.
28	Feb 21 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
29	Mar 12 1984	X	Reply brief of petitioner NCAA filed.
30	Mar 20 1984		ARGUED.